United States Court of Appeals

for the Second Circuit



BRIEF FOR APPELLEE

76-5023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re :

W. T. GRANT COMPANY, :

Bankrupt, :

ZARTLEG DEVELOPMENT CORP., :

Appellant, :

-against- : Docket No. 76-5023

THE CHANNEL COMPANIES, INC., :
and CHARLES G. RODMAN, as Trustee
of Estate of W. T. Grant Company, :
Bankrupt,

Appellees. :

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE-TRUSTEE

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Issues Presented

The instant appeal presents essentially two issues for determination:

1. Did the United States District Court for the Southern District of New York (the "District Court") err in affirming orders of the Bankruptcy Court which allowed the submission of new offers for property of the bankrupt estate and enabled an additional recovery of $227,400?

2. By virtue of the failure of Zartleg Development Corp. ("Zartleg"), the Appellant, to obtain a stay of the implementation of the orders of the Bankruptcy Court, is the appeal at bar moot by reason of the provisions of the Rules of Bankruptcy Procedure?

Preliminary Statement

Zartleg appeals from an order of the District Court dated May 17, 1976. (A226-28).* The order, made by the Honorable Inzer B. Wyatt, District Judge, affirmed two orders of the Bankruptcy Court, each dated December 31, 1975, and a third, dated March 2, 1976. The December 31, 1975 orders confirmed the sale of certain leasehold interests of the bankrupt estate to The Channel Companies, Inc. ("Channel"). The Bankruptcy Court made these orders after a hearing at which Zartleg and Channel each submitted offers to purchase the leasehold interests. Channel submitted the highest offers for the two leasehold interests which had been offered for sale by the bankrupt. The third order of the Bankruptcy Court affirmed by District Judge Wyatt denied Zartleg's motion for reargument. (A139-56; A208-212).

The appeal at bar had its genesis in a hearing held before the Bankruptcy Court on December 11, 1975, at which, pursuant to authority of the Bankruptcy Court, W. T. Grant

* References in parentheses are to pages of the Appendix.

Company ("Grant"), then a debtor-in-possession under Chapter XI of the Bankruptcy Act, was offering for sale to the highest offerors various leasehold interests covering discontinued retail outlets. At that hearing, Zartleg submitted offers in connection with two of the leasehold interests in the total amount of $53,000, which were the highest offers for those two leasehold interests. Subsequent to the hearing and prior to the entry of any order confirming the sale of the two leasehold interests to Zartleg, Channel, which had been present at the hearing on December 1, 1975, made a motion to reopen the hearing as to those two leasehold interests for the purpose of enabling it to submit new offers. Upon consideration of Channel's motion, the Bankruptcy Court in the exercise of its discretion reopened the hearing.

A further hearing to consider offers to purchase the leasehold interests was held before the Bankruptcy Court on December 31, 1975. During that hearing, the Bankruptcy Court received an offer from Channel in the sum of $280,400 for the purchase of the two leasehold interests. Channel's offer was the highest received at the hearing and represented an increase of $227,400 over the Zartleg offers of December 11, 1975 in the aggregate sum of $53,000. Subsequent to the hearing and on December 31, 1975, the Bankruptcy Court made two orders confirming, respectively, the sales of the leasehold interests to Channel.

bid in good faith $26,500, if I recall the numbers correctly.

Let's hear from the moving party.

MR. ABRAMOWITZ: I think you have named the issues. Channels has informed Mr. Cherkis of this, has made additional bids in the sum of $70,000 and in the amount of $35,000 on the Cinamonson property.

We will put on expert testimony to show that the $26,500 bids by Zartleg are inadequate for the price of the lease.

The lease is worth much more than that. We point out that the order of confirmation that was submitted to Your Honor doesn't find that the bids are adequate or reasonable or fair.

It states they were the highest and best. It is submitted that is not sufficient in a case such as this and even absent higher bids these offers for these leases should be rejected.

I don't want to argue the law at this time other than to point out that the

law is clear in this circuit that the successful bidder is no more than a bidder until the confirmation and there are cases where the courts without anything further have rejected those bids on the ground that a higher bid has been submitted.

THE JUDGE: I have read your papers.

MR. ABRAMOWITZ: There are papers that I gave you originally. They were done in haste. Some of the Second Circuit Court cases were not there. I was served a few moments ago with a brief from Zartleg and I don't know what is in there.

I would call our first witness. Other than to say that in addition to Zartleg and to Grant I also give telephone notice to the creditors committee to an attorney at Weil, Gotshal.

MR. ROCHELLE: We are here.

MR. HENRY: The initial relief that is sought here by Channel, Your Honor, is an order of this court denying confirmation and authorization by the sale of lease

by them to Grant.

We take the position and it has always been the fact and the law that when the highest bid is made that is confirmation. The closing of the bidding and the acceptance of the highest bidder at the hearing constitutes confirmation.

Your Honor, if that were not so, than in all of these proceedings where offers of property are made before this court, offers of purchase are made before this court, it would be a futile gesture for bidders who have received notice and have had an opportunity to make bids would make bids before this court and after the highest bid has been made and the other bidders back away that at a subsequent time that a closing bidder can change his mind and suddenly discover that the asset is worth more.

It would interrupt. It would make a shambles of this procedure in any such instance.

Now, the thrust of Mr. Levine's affidavit is that Channel had no knowledge of the fact that higher and better bids for the leases described would be solicited and accepted by the Bankruptcy Court at the hearing on December 11th.

THE JUDGE: I reject that contention. I have already discussed this. I am satisfied that the notice and the order to show cause that went out certainly indicated that the present high bid and higher bidder would be entertained.

Let's move on from there.

MR. HENRY: That's correct. They had their opportunity and made their highest bid. If they felt it was worth more at that time why did they start at a bid of $20,000 and the bids -- $500 increments until the final bid of $26,500 was the closing bid which the court accepted and constituted a consummation of the sale.

THE JUDGE: The problem now is that the moving party has said that if the

bids are reopened you will bid 70 and 35.

How can the court turn down bids of that significance?

MR.HENRY: I should like to point out, Your Honor, that my client relied upon the confirmation of this sale and went out and spent money in anticipation of reopening these stores based upon the confirmation and approval of the highest bid by Your Honor.

The fixtures have been prepared, men have been set aside and expense and time have been spent. I would like to point out also to Your Honor that the real issue why these people are endeavoring to beat us out of these leases and offer additional amounts over and above the bid that was confirmed at that sale is the fact that they are conpetitors of ours in New Jersey and stores in that state and were willing to pay more to keep us out of theee areas where the two stores are located.

There must be some finality to an opening bidding on property in this U.S. District Court. You cannot keep reopening even though a further bid is made.

THE JUDGE: I think at the conclusion of this hearing that I told counsel for Grant to submit an order anddid not consider anything as being final.

MR. HENRY: Your Honor approved the final order and we consider that as a confirmation.

The cases in their brief refer to non-judicial sales conducted by auctioneers were under Rule 13 before the sale is final it must be confirmed by the court and they call the court only in instance of less -- of five percent.

Your approval is confirmation of the sale and all parties are bound by it. Our client will not let this go, Your Honor, without taking further recourse if further bids are allowed due to the

expense that we have incurred and due to the fact that in our brief we feel that the law is on our side and that this sale was confirmed and that an order should be signed awarding the sale of these leases to our client, Your Honor.

THE JUDGE: Bring up your witness.

MR. ABRAMOWITZ: I want to say two things is that the argument that these sales have been confirmed is not so.

I think the exact situation occurred on the Fourth Circuit.

THE JUDGE: Call your first witness.

MR. ABRAMOWITZ: I call Mr. Tudor.

B E R N A R D T U D O R,

Called as a witness, having been first duly sworn by the Judge, was examined and testified as follows:

EXAMINATION BY THE JUDGE:

Q What is your full name?

A Bernard Tudor.

Q What is your address?

A 36-02 Lenox Drive, Fairlawn, New Jersey.

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Grant

EXAMINATION BY MR. ABRAMOWITZ:

Q Can you give us your educational background and your familiarity in real estate matters in your present occupation?

A I graduated N.Y.U. in 1941 with a B.A. in business administration. I worked for an organization called J.I. Kislack Realty and was an assistant vice-president in charge of the commercial leasing and commercial property department for seventeen years.

I then worked for two years for the Frank Development Company from 1133 Avenue of the Americas who subsequently sold out to Arlen Properties and then I went into business with a partner called Bernelli Realty, which was a brokerage and development firm in commercial -- in shopping centers.

Presently I am a real estate consultant for the Channel Company.

Q Are you familiar with the Cinamonson property and the Cherry Hill property?

A Yes.

Q Did you attend the auction on December 11, 1975?

A Yes.

Q When you went to that auction, did you know that oral bids would be accepted at the auction?

A No, I did not.

MR. HENRY: I object on the ground that the order to show cause indicated and if he is a consultant --

THE JUDGE: I will allow the answer to stand and I will give it whatever value I think it is worth, which is not very much.

Q Will you tell us what occurred on December 11th when you were at the bidding of these two properties?

THE JUDGE: I am more interested in he telling me what these leases are worth. I have a heavy calendar and have another matter to be heard after this.

Get to the nub of the problem and I would appreciate it.

MR. GEWERTZ: I think there is a transcript of that in which that is said.

Grant [12]

I don't think that any testimony is required.

MR. ABRAMOWITZ: I was asking for what happened vis-a-vis his communication with Channel when he found out there was oral bidding.

MR.HENRY: That is irrelevant.

MR. ABRAMOWITZ: I think you had stated that we could put something in record form.

THE JUDGE: Making a record and duplicating what is in the transcript doesn't make much sense.

MR. ABRAMOWITZ: I think it will take five minutes.

Q Rather than repeating what happened, perhaps for this purpose I can lead you a little bit.

There came a time when there was a bid of 20 from Channel and then there was an oral bid made?

A Yes.

Q Then there was an application on

behalf of Channel to adjourn for ten minutes so that the Channel Corporation could be contacted?

A Yes.

Q Did you call the Channel Corporation?

A Yes.

Q Can you tell us what you said?

MR. HENRY: I will object.

THE JUDGE: I will allow it.

A I spoke to Mr. Robert Slaughter, executive vice-president of the company, and told him that unexpectedly, as I didn't anticipate there was an actual bidding going on and that seemed that the highest bidder was going to take the lease.

I would like to go or have a figure as to how far I can go or how far the attorney could go who was representing us in bidding on these leases.

The phone was then turned over to Mr. Louis Slaughter, the chairman of the board, and the attorney picked it up.

Q Did you come back into the courtroom and did you continue bidding until $26,000?

A That's correct.

Q Then what happened, did you make

another telephone call to Channel?

A The attorney asked the judge at that time if we could have another period of time, an adjournment to go out and contact the principals.

That was refused.

Q Didn't you go out and contact the Channel Company?

A Yes, I ran out and tried to contact them.

Q Did you contact the Channel Company?

A Yes, I did. I got directly to Mr. Louis Slaughter, the chairman of the board and he told me --

MR. HENRY: I object to that testimony. I move to strike that out. It is not binding upon my client.

THE JUDGE: I will hear it.

A Mr. Louis Slaughter told me to go as high as I have to go but to bring that store in.

Q What happened next?

A I got up to return to the court and our attorney walked out and met me halfway from the phone booth and said that the bidding was done and it was taken for $26,500.

Q You are familiar with the two

pieces of property; is that correct?

A Yes.

Q Why are you familiar with these sites?

A I have studied that area for Channel and made surveys of the area and negotiated on various pieces of property.

Q Was this prior to learning of the availability of the two Grant leases?

A Yes.

Q Can you tell us what other properties are available, comparable properties, near the two properties in question?

A Cinamonson approximately half a mile, that would be west of this location is the mall and there I was offered two locations; one the rental was $2.15 a square foot gross as against three percent of gross sales and the other one was $2.50 a square foot gross against three percent of gross sales.

Q What was the size of these two stores?

A Approximately 18,000 square feet.

Q Are you familiar with any other stores in that area?

A Yes, in Morristown on Route 38 a building was formerly occupied by Korvettes when we were offered a location there to take over a piece of that property and the rental there was $3 a square foot net, and the taxes in that area run about 50¢ a square foot.

Q Was there any percentage on that lease?

A Yes, that was also three percent -- the rent was versus three percent of gross sales.

Q What was the terms of the lease?

A The terms of the lease were fifteen years with four five-year options.

Q Were there any other properties that you have investigated?

A Yes, one of which was in the Mall or near the intersection of Route 70 and 73. It is a vacant A & P store.

Q Approximately how far is that from either one of these sites?

A Six or seven miles from the Cinamonson site.

Q Have you been negotiating on behalf

of Channel for that site?

A Yes.

Q Can you tell us what those negotiations are about?

A Yes, in that case we have been negotiating on the basis of $? a square foot gross, plus a tax stop clause against three percent of gross sales.

Also the condition of the building is such that it has to be repaired and we would have, the tenant would have to make the repairs and alterations which would amount to about $75,000.

Q When you say that you have been negotiating about $2 a square foot, did Channel make an offer for that amount?

A No, these are actual figures. The original figures we started out with were in the realm of $3 and these are final deals that we could make.

Q These are final deals then?

A Yes.

Q Are there any other properties in this immediate area that you are aware of, Elsberg Circle?

A Yes, there is on Elsberg Circle, which is

which is the intersection of Route 41 and 47 there is a vacant Bate's Discount Store. 80,000 square feet and we are negotiating on that in taking over approximately 20,000 square feet of that building and the rental would be $3 a square foot net-net.

The taxes in that area runs between 35¢ and 50¢ a square foot.

Q Are you familiar with the rental on these two Grant leases?

A Yes.

Q Can you tell us what they are?

A In one case, in the case of Cinamonson it runs about $1.10 a square foot and in the case of Cherry Hill it is about 1.25¢ a square foot.

Q Can you tell us when the initial term of the lease expires?

A Approximately, they expire in about seven years.

Q If I told you that they expired in 1981 would that refresh your recollection?

A Yes, that's correct.

Q Are there any extensions or options to extend the leases?

A Yes, there are five-year options.

Q You mean four five-year options?

A Yes.

Q What would be the rent should the tenant extend the lease for that period of time?

A The same rent, the $1.25 in both pieces of property.

MR. ABRAMOWITZ: I have no further questions at this time.

THE JUDGE: Assuming that all of the facts that you have stated in the record are true, are you in a position to advise your client what it would be worth for it to bid under this kind of a lease?

THE WITNESS: Yes.

THE JUDGE: When?

THE WITNESS: When?

THE JUDGE: When did you advise your client?

THE WITNESS: Only after the situation took place.

THE JUDGE: Do you mean after the bidding in court the last time?

Grant

THE WITNESS: Yes.

THE JUDGE: What type of value did you place upon these --

MR. HENRY: I object on the ground that he has not established any qualifications, the value of the lease. He is an interested party having been employed by Channel and as such is not qualified as an appraiser for the benefit of the court to testify as to the value.

Further, on the ground that under the procedure in the law in this state that the closing bid at the sale conducted before Your Honor constitutes the actual value of these leases, rather than any subsequent appraisal after the conclusion of the sale.

THE JUDGE: I will overrule your objection and allow him to answer and give it such weight as I think is deserved.

Did you have a conversation with your principal in Channel wherein you advised them as to what amount it would be

worth to bid in this court to get these leases?

THE WITNESS: Yes, after the fact or after the bidding took place I did.

THE JUDGE: What did you advise them?

THE WITNESS: I advised them that based upon the length and term of the lease with the four-year options that if they paid $50,000 for the lease --

THE JUDGE: Which lease?

THE WITNESS: The Cinamonson lease and the Cherry Hill lease, which is practically the same size, the stores, it would come out to an additional rental of 12¢ a square foot.

THE JUDGE: You suggested to your client that they increase their bids by $100,000 on both properties?

Is that what you are saying?

THE WITNESS: $50,000.

THE JUDGE: I am adding the two together. You said $50,000.

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Grant

THE WITNESS: Yes.

THE JUDGE: That is $100,000.

MR. ABRAMOWITZ: I thought you meant a total increase of $100,000.

THE JUDGE: All right.

EXAMINATION BY MR. HENRY:

Q When did you first speak to the principal of Channel about this property?

A I can only recollect that it's about a month or two before the sale took place. About a month before the sale took place.

Q Either prior thereto or subsequent thereafter you examined the documentation and appraised the property and looked over the property?

A I looked over the property. I didn't fully examine the documentation, no.

Q Did you speak to him after you looked over the property?

A Yes, I did.

Q When this $20,000 offer was made on each of these leases it was your recommendation that this be the price?

A No, they did not consult me on what

they were going to offer.

Q Did yougive them any idea as to what you thought was the value of it?

A No.

Q Why did they consult you as to whether or not it would be a good retail store or as to whether or not a reasonable amount of money should be bid for these leases?

A They consulted me on the basis of it being a good retail location for their business and also a good business deal on the basis of purchasing these leases.

Q Are you telling me as a retail -- a real estate appraiser that you did not discuss with the principal of Channel what the value of these leases were?

A I am not a real estate appraiser. I am a consultant to Channel.

THE JUDGE: You are not on an annual salary and are paid as youare called upon for services?

THE WITNESS: I am on an annual amount for these services that is paid to me.

Q Then you would know the value of these leases?

MR. ABRAMOWITZ: I object.

THE JUDGE: I will allow it.

A I do know the value based upon my experience and my knowledge.

Q Are you aware as to whether or not the rent includes a percentage of rent?

A Yes, I am.

Q What is that percentage?

A Three percent.

Q In arriving at whether or not this deal would be a good deal for your client, you took that into consideration?

A I certainly did.

Q Did you also give them an estimate as to what the annual sales in this store might be?

A No, I gave them the facts and they made the estimate.

Q Did you give them any facts concerning the probable sales on an annual basis that could occur for their product in that store or in those stores if they acquired the leases?

A No.

Q You say that you are not a real estate man and are an expert on retail stores, so therefore you should have a knowledge as to what sales would bring in a particular locality?

MR. ABRAMOWITZ: I object.

Q What would be the total rent on these properties under the present leases?

MR. ABRAMOWITZ: I object.

THE JUDGE: Do you understand the question?

THE WITNESS: What is the rent on the lease now?

THE JUDGE: Yes.

A In one case it is $31,000 approximately versus gross sales and the other one is $26,000 against the percentage.

Q As an expert on retail stores, did you attempt to apprise yourself or advise your client as to what the probable sales as an expert on retail property?

MR. ABRAMOWITZ: Objection. That was asked and answered.

THE JUDGE: Overruled.

A I did not advise my client. All I did was give them the fact that they asked for.

Q What facts did you give them, the rent and the percentage?

A The location, the road pattern, the size of the store, what was in the shopping centers in the area, what other properties I have negotiated on, what their ability was to lease other stores in the area.

Q How can you arrive at the value of a lease when you are unable to determine what the total rent would be because, as you said, you are unable to determine what the total sales would be in that location?

How can you advise your client as to whether or not that lease was worth the amount of money that you have indicated?

MR. ABRAMOWITZ: Objection.

THE JUDGE: Overruled.

MR. ABRAMOWITZ: He testified he did not advise his client.

THE JUDGE: His response to my

question was did he recommend $50,000.

MR. ABRAMOWITZ: That was after the situation.

THE JUDGE: I didn't hear any time limitation.

MR. HENRY: That's right.

Q You arrived at a figure of $50,000 as to the value of these leases and not being qualified as you have indicated as to the amount of business that would be done in these stores based upon the annual rent plus the percentage, how do you determine the value of the lease without knowing the total sales?

A I know that the Channel Company based on their financial report of last year does somewhere in the vicinity of $43 and $50 million, and when I take into consideration their locations and what they did in various other locations, I estimated as to what kind of sales they could do.

Q You said before and testified that you did not estimate their sales and you did not discuss that with Channel?

A I didn't discuss it. You asked me if I

estimated it. I didn't discuss is with them, but I estimated it.

Q You did not tell your client; is that correct?

A I did not tell my client.

Q So you did not enable him to arrive at what he thought was the value of the lease?

MR. ABRAMOWITZ: Objection.

THE JUDGE: I will allow it.

A I felt that my clients asked me for the information that they wanted and they have their own method of determining how they are going to move forward as far as new stores are concerned.

From that point on, it is their baby.

Q Whose estimate of the value is it, your clients or your estimate of $50,000 for each store?

A It was my estimate after discussing it with my client after the procedure when we sat down and discussed it.

Q You mean after the client said to you, "Get this store at any price." Is that correct, that is the value he put on it? Is that the

discussion that you had on the telephone?

MR. ABRAMOWITZ: I don't understand your question.

THE JUDGE: Restate the question.

Q You testified as to a telephone conversation subsequent to the sale.

A Right.

Q You testified as to what your client told you about what he would pay. Would you repeat it? You stated it earlier.

A He said, "Get that lease. Pay as much as the bid but don't come back without the lease."

Q In other words, he gave you unlimited authority to purchase these leases; is that correct?

A No, one lease. It was too late for the other one. I had no opportunity to speak to him previously.

Q Are you aware of the fact that Grant is in default under the lease and they have not been paying the rent and that there are termination clauses in the lease and that the landlords may refuse to consent and quarrel with and contest the

sale of these leases.

MR. GEWERTZ: I object to the question. It assumes a fact that has not been established.

THE JUDGE: I will sustain your objection.

MR. GEWERTZ: Thank you.

Q Are you aware that there are some questions as to whether or not the sale of these leases would be binding upon the landlords?

A I was only made aware of that today previous to coming to court.

Q Nevertheless you made your appraisal of the values prior to today without knowing about that; is that correct?

A That's right.

Q If you knew there were legal questions that may have to be resolved and there may be some question as to the right to sell this lease would your estimate of these leases nevertheless be the same?

A No, I would leave it up to people who are more legally sophisticated and knowledgeable

than I am.

Q Did you read the lease?

A No, I did not.

Q You are not acquainted with the covenants of the lease and terms?

A I am acquainted only with a synopsis of the lease.

Q Don't you think that if you are advising your client with respect to the lease that you should have read the lease?

A I should have read the lease, but they have competent attorneys and I was told that the attorneys were given the leases to read.

MR. HENRY: I have no further questions.

EXAMINATION BY MR. GEWERTZ:

Q Your original bid was $20,000 on each of these properties; is that correct?

A my client's bid.

Q Your client would have been willing to close the deals and take the leases for that price; is that correct?

A Yes, I would say so.

Grant

MR. GEWERTZ: I have no further questions. I would like to make a motion --

THE JUDGE: I would like to hear from the creditors committee.

MR. ROCHELLE: We would like to hand up to the bench a decision. It is an unreported decision by Judge Levitt back in 1961.

MR. GEWERTZ: My motion was addressed to the testimony of the witness and not addressed to the general merits.

THE JUDGE: We will hold that aside.

MR. GEWERTZ: I would move to strike the testimony of the witness as to value. The only issue here that I see is whether or not Your Honor's discretion should be exercised to reopen the bidding at this time.

The question of the value of the lease in the normal sense is not relevant here. This is not a normal asset that you have. It is not something that he can warehouse and hold for a later sale sometime

down the road. This is a wasting asset that had to be sold. We have these legal questions which was alluded to on cross-examination by counsel which is one factor --

THE JUDGE: I will deny your motion. I will allow his testimony.

MR. GEWERTZ: It is a wasting asset in the sense that as long as this lease is not sold Grant is incurring U & O charges at about $2,500 for one of them and $1,875 on the other one.

THE JUDGE: Did you intend to put on a witness?

MR. ABRAMOWITZ: I intend to put on a witness.

MR. HENRY: I move that the testimony be stricken in that the sale was confirmed with the highest bid on December 11th and Your Honor should sign the order that was submitted to the court on that date.

Also, I move at this time that the order to show cause and the application on which it is made, the affidavit on which

it is made, the application order be denied and dismissed.

MR. ABRAMOWITZ: I don't understand these motions in the middle of a hearing.

THE JUDGE: I will hear from the creditors committee now.

MR. ROCHELLE: I hand up to Your Honor a decision by Judge Levitt in 1961 in Adeline Apparel Shops, Inc., the case is on all fours with the situation here.

In that case there was a bid that was accepted by the referee in open court and later in the afternoon the successful bidder was to come back with a $10,000 deposit and at or about the time the successful bidder came back with his chekc and a bidder came back and raised the ante up to $70,000 and the bankruptcy judge said that this proceeding was not closed and he at that time accepted the $70,000 bid -- pardon me. I am incorrect.

The initial successful bidder had to raise his ante to remain the winner

and at that time the proceedings were closed and an order was entered.

The judge affirmed what the bankruptcy judge did on the theory that there is no finality to this sort of judicial sale until such time an order is entered and that is the same as is involved here.

THE JUDGE: I am satisfied in the interest of justice and in the estate of W.T.Grant that I open the bidding and I will do so now and invite both parties to do so now.

MR. HENRY: I think that perhaps under the circumstances, Your Honor, since it was not contemplated that bidding would be conducted today that there be a short adjournment for a day or two at which time the parties can prepare more.

THE JUDGE: Are you talking about bidding or preparing an appeal?

MR. HENRY: For bidding under protest.

THE JUDGE: I understand counsel

is prepared to bid $70,000 on one property and 35 on another.

MR. ABRAMOWITZ: Yes. On behalf of Channels Co. Inc. I hereby bid $35,000 for the Cinamonson lease and $70,000 for the Cherry Hill lease.

I have briefs to that effect.

MR. HALPER: I am Emanuel Halper. We are the general counsel for the Zartleg Development Corporation and am the secretary of the Zartleg Corporation and authorized to bid here.

In light of the case submitted by counsel for the creditors committee, I would ask the court that in the interest of justice instead of opening the bidding, that as successful bidder under the initial bidding that we have the right to match the bid, the highest bid that Channel is willing to submit now and that our matched bid be one under protest pending the possibility of an appeal.

THE JUDGE: I don't understand

what procedural gimmickery that is.

I am giving you the authority to match the bid or beat the bid.

Frankly, I think that both of you were trying to take the lease at the most reasonable price that you could at the last hearing and it now appears to the court that someone was going to get a bargain and I am curing that by opening up the bidding.

Counsel has opened up the bid for $105,000.

MR. HALPER: I will better the bid by $500.

THE JUDGE: We have $70,000 on which property?

MR. GEWERTZ: There are two properties.

MR. ABRAMOWITZ: The bid was $70,000 on the Cherry Hill lease and --

MR. HALPER: I bid $70,250 and $35,250 on the Cinamonson lease.

THE JUDGE: Are there any other

bids?

MR. ABRAMOWITZ: We will bid 45 on the Cinamonson property and 85 on the Cherry Hill property.

MR. HALPER: I will increase the bid for each parcel by $250.

MR. ABRAMOWITZ: We will bid 100 on the Cherry Hill and 50 on the Cinamonson.

THE JUDGE: What was the amount on Cinamonson?

MR. ABRAMOWITZ: 50.

MR. HALPER: I request an adjournment now to call the president of the parent company.

THE JUDGE: I will grant you a ten-minute adjournment. Try to get whatever authority necessary to conclude this bidding.

The court is going to take a brief recess and we will start with the James Talcott matter as soon as we finish this proceeding.

MR. HENRY: I would like to address

the court. If Your Honor please in view of these circumstances and not being aware that there was a continued auction being conducted here today, as far as we are concerned the subsequent bids that we made at this time are under protest, nevertheless we have attempted to communicate with our principal for the purposes of getting authority as they previously attempted to do and have been unable under these circumstances to communicate with him on this short notice, not anticipating what was going to occur.

We think that in the interest of justice and in view of what has occurred the amount of money that appears to be involved and it appears to be substantial for the purpose of obtaining the largest sum for the estate of W.T.Grant, we feel that it would be in the interest of justice to grant a short adjournment for the bidding in view of the large amounts involved for the purpose of getting the authority to

come back and continue the bidding.

MR. ABRAMOWITZ: May I ask what he means by a short adjournment?

THE JUDGE: Tomorrow morning.

MR. HENRY: The principal is in Florida.

THE JUDGE: We have telephones. If it is important you canrreach your mother-in-law if you had to.

MR. ABRAMOWITZ: I have no objection to anaadjournment until sometime tomorrow.

MR. HENRY: What is the urgency? The court issued an order to show cause.

THE JUDGE: I want to bring this to a head. The entire system is being threatened by this proceeding and I will allow an adjournment until 11 o'clock tomorrow morning.

MR. HENRY: Could we make this 2 o'clock to give us an opportunity --

THE JUDGE: Tomorrow is New Year's Eve. It will be at 11 o'clock.

Grant

MR. ABRAMOWITZ: Your Honor --

THE JUDGE: It will be resolved tomorrow morning.

MR. ABRAMOWITZ: Your Honor --

MR. HENRY: May I suggest, Your Honor -- excuse me, I am sorry. That whoever is the successful bidder tomorrow, if the parties agree and there is a winning bid they should come down with an order and have you sign it.

THE JUDGE: Forthwith.

MR. GEWERTZ: I suggested that.

MR. HALPER: Is this because of a technicality --

THE JUDGE: I am here to resolve problems. We will resolve it tomorrow and we will have an order prepared by Grant tomorrow.

MR. ABRAMOWITZ: Your Honor, I have two other witnesses that I would put on the stand and I would like to make a brief as to what their statement would be.

THE JUDGE: Just a minute. I have

granted your order to show cause by opening up the bidding. What more can your witness add?

MR. ABRAMOWITZ: They would testify as to the value of these leases. I would offer to put such testimony on.

THE JUDGE: State what they would have testified had they been allowed to testify.

MR. ABRAMOWITZ: I believe they would have testified that the value of these leases were in the range of $75,000 minimum value.

MR. GEWERTZ: I would have renewed my motion to strike that testimony had it been offered.

MR. HENRY: I join in that motion.

THE JUDGE: This matter is adjourned until 11 o'clock tomorrow morning.

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TRANSCRIPT OF DECEMBER 31, 1975 PROCEEDING BEFORE JUDGE GALGAY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter

of

W.T.GRANT COMPANY

No. 75 B 1735

U.S. Courthouse
Foley Square
New York, New York

December 31, 1975

Adj OSC (Channels Co., Inc.)

B E F O R E:

HON.JOHN J. GALGAY,

Bankruptcy Judge

RAYVID REPORTING SERVICE
CERTIFIED STENOTYPE REPORTERS
150 NASSAU STREET
NEW YORK, N. Y. 10038
CORTLANDT 7-3877
3878

A P P E A R A N C E S:

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BY: MARK ABRAMOWITZ, Esq., of Counsel.

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767 Fifth Avenue
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BY: WILLIAM J. ROCHELLE,III, Esq.,of Counsel.

BALLON, STOLL & ITZLER, ESQS.,
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1180 Avenue of the Americas,
New York, New York

BY: WILLIAM J. HENRY, Esq.,of Counsel
- and -
ROBERT GRANT, Esq., of Counsel.

- - -

THE JUDGE: As I recall yesterday, it was at your request that the short adjournment was granted.

MR. HENRY: Before the bidding starts, Your Honor, I would like to make a motion.

[3]

Grant

I move to dismiss the order to show cause of Channels on the ground that the sale was confirmed on December 11, 1975 authorizing the sale of the leases to Zartleg Development Corporation as the highest bidder at that time.

I would like to put in the record that any further bidding that would be done by Zartleg Development Corporation today is being made under protest for the same reason as outlined in my motion.

THE JUDGE: I believe I denied your motion yesterday, did I not?

MR. HENRY: I believe so. I just renewed it.

THE JUDGE: I will follow my instincts from yesterday and deny it again.

The last bid that I recall having been offered yesterday was by Mr. Abramowitz which was $100,000 for Cherry Hill lease and $50,000 for the Cinamonson lease; is that correct?

MR. ABRAMOWITZ: That's correct,

Your Honor.

THE JUDGE: That is the highest bid, do you intend to do any bidding?

MR. GRANT: We up the bid up to 300 for Cherry Hill and 200 on Cinamonson, whatever they bid before.

THE JUDGE: That would be $50,200 on Cinamonson.

MR.ABRAMOWITZ: We will bid $55,000 on the Cinamonson and $105,000 on the Cherry Hill.

MR. GRANT: I will bid 300 more on the Cherry Hill property, 200 more on the Cinamonson property.

MR. ABRAMOWITZ: The bid on the Cherry Hill is $105,000 and the bid on the Cinamonson is $55,000.

MR. GRANT: I will add $300 to Cherry Hill and $200 on Cinamonson and that is where we stand.

THE JUDGE: Cherry Hill is $105,300 and Cinamonson is $55,200.

MR. ABRAMOWITZ: We bid $55,500 on

the Cinamonson and $115,000 on the Cherry Hill.

MR. GRANT: We raise the bid on Cherry Hill by $300 and the one on Cinamonson by $200.

THE JUDGE: The most recent bid is $115,300 and $55,700.

MR. ABRAMOWITZ: We will bid $56,000 on the Cinamonson property and $125,000 on the Cherry Hill property.

MR. GRANT: I raise the bid on Cherry Hill by $300 and I raise the bid on Cinamoneon by $200. That is $125,300 on Cherry Hill and $56,200 on Cinamonson.

MR. ABRAMOWITZ: We will bid $56,500 on the Cinamonson property and $135,000 on the Cherry Hill property.

MR. GRANT: I increase the bid on Cherry Hill by $300 and I increase the bid on Cinamonson by $200.

THE JUDGE: The highest bid right now is $135,300 on Cherry Hill and $56,700 on Cinamonson.

MR. ABRAMOWITZ: We bid $135,500 on the Cherry Hill and $57,000 on Cinamonson.

MR. GRANT: I raise the bid on Cherry Hill by $1,000 and I raise the bid on Cinamonson by $200.

THE JUDGE: That makes the Cherry Hill property $136,500 and the Cinamonson property $57,200.

MR. ABRAMOWITZ: We will bid $57,400 on the Cinamonson property and $136,800 on the Cherry Hill property.

MR. GRANT: I raise the bid on Cherry Hill by $2,000 and I raise the bid on Cinamonson by $200.

THE JUDGE: The most recent bid is $138,800 for Cherry Hill and $56,700 for Cinamonson.

MR. ABRAMOWITZ: We will bid $57,900 on the Cinamonson property and $139,000 on the Cherry Hill property.

MR. GRANT: I increase the bid on Cherry Hill by $3,000 and I increase the bid on Cinamonson by $200.

THE JUDGE: The most recent is $142,000 on Cherry Hill and $58,100 on Cinamonson.

MR. ABRAMOWITZ: We will bid $58,300 on Cinamonson and $142,200 on Cherry Hill.

MR. GRANT: I increase the bid on Cherry Hill by $5,000 and I increase the bid on Cinamonson by $200.

THE JUDGE: The most recent bid being $147,200 for Cherry Hill and $58,500 for Cinamonson.

MR. ABRAMOWITZ: We will bid $58,700 on the Cinamonson property and $147,500 on the Cherry Hill property.

MR. GRANT: I increase the bid on Cherry Hill by $5,000 and increase the bid on Cinamonson by $200.

THE JUDGE: The most recent bid for Cherry Hill is $152,500 and Cinamonson $58,900.

MR. ABRAMOWITZ: We will bid $152,700 on the Cherry Hill property and $59,100 on Cinamonson.

MR. GRANT: I increase the bid on Cherry Hill to a round $155,000 and increase the bid on Cinamonson by $200.

THE JUDGE: The highest bid is $155,000 for Cherry Hill and $59,300 for Cinamonson.

MR. ABRAMOWITZ: We will bid $59,500 on the Cinamonson property and $155,200 on Cherry Hill.

MR. GRANT: I increase the bid on Cherry Hill by $1,000 and increase the bid on Cinamonson by $200.

THE JUDGE: I have $156,200 on Cherry Hill and $59,700 on Cinamonson.

MR. ABRAMOWITZ: On Cherry Hill we will bid $156,400 and on Cinamonson $59,900.

MR. GRANT: After this point all my bids on Cinamonson will be conditioned upon our winning -- having the highest bid with respect to Cherry Hill. I increase my bid --

MR. ABRAMOWITZ: I will object to any conditional bid. These are two individual stores that are up for bids

at individual times and while we have been bidding on them together at the same time they were put up separately and should be treated as two separate parcels.

THE JUDGE: I am not inclined to make a package out of the property at this stage of the proceedings.

MR. HENRY: I will object to your ruling for the record, nevertheless.

MR. GRANT: We will increase our bid on Cherry Hill by $5,000. We will increase our bid or up the last bid on Cherry Hill by $5,000 and we will increase the last bid on Cinamonson by $200.

THE JUDGE : I have $161,400 and $60,400 on Cinamonson.

MR. ABRAMOWITZ: We will be $60,300 and on Cherry Hill $161,600.

MR. GRANT: We will increase our bid in Cinamonson by $100 and we will increase -- excuse me, not our bid, we increase the last bid by $100 on Cinamonson and the last bid on Cherry Hill by $1,000.

MR. ABRAMOWITZ: We will bid --

THE JUDGE: Just a moment.

The last bid is $162,600 for Cherry Hill and $60,400 for Cinamonson.

MR. ABRAMWOITZ: We bid $60,600 on Cinamonson property and $162,800 on the Cherry Hill property.

MR. HENRY: We will increase our bid by $50, the last bid in Cinamonson and we will increase the last bid by $5,000 in Cherry Hill.

MR. ABRAMOWITZ: We will bid --

THE JUDGE: I have $167,500 for Cherry Hill.

MR. ABRAMOWITZ: I am at $168,800.

THE JUDGE: You are right and $60,650 for Cinamonson.

MR. ABRAMOWITZ: We will bid $60,850 on the Cinamonson property and $168,000 on Cherry Hill.

MR. GRANT: We increase each bid by, the Cherry Hill by $300 and the Cinamonson bid by $200.

THE JUDGE: I have $168,200 for Cherry Hill and I have $61,050 for Cinamonson.

MR. ABRAMOWITZ: We will bid $61,250 on Cinamonson and $168,500 on Cherry Hill.

MR. GRANT: We increase the bid on Cherry Hill by $300 and increase the bid on Cinamonson by $200.

MR. ABRAMOWITZ: We will bid $169,000 on the Cherry Hill property and $61,650 on Cinamonson.

MR. GRANT: We increase the bid on Cherry Hill by $400 and the bid on Cinamonson by $100.

THE JUDGE: $100 on Cinamonson?

MR. HENRY: Yes.

MR. ABRAMOWITZ: We will bid --

MR. HENRY: It is $169,400 on Cherry Hill and $61,750 on Cinamonson.

MR. ABRAMWOTIZ: We will bid $61,950 on Cinamonson and $169,600 on Cherry Hill.

MR. GRANT: I increase the bid $200 more on Cherry Hill and $50 more on Cinamonson.

THE JUDGE: It is $169,800 on Cinamonson and on Cherry Hill it is $62,000.

MR. ABRAMOWITZ: We will increase $62,200 on Cinamonson and $170,000 on Cherry Hill.

MR. GRANT: We increase the bid on Cherry Hill by $200 and I increase the bid on Cinamonson by $50.

THE JUDGE: The last bids are $170,050 for Cherry Hill and $62,000 for --

MR. HENRY: No, $170,200 for Cherry Hill and $62,250 for Cinamonson.

MR. ABRAMOWITZ: We will do the same as we did before and that is bid $62,450 on Cinamonson and $170,400 on Cherry Hill.

MR. GRANT: We increase our bid on Cherry Hill and our bid on Cinamonson by $50.

MR. ABRAMOWITZ: We will increase

our bid on each property by $200, that is $62,700 on Cinamonson and $170,800 on Cherry Hill.

MR. GRANT: We increase the bid on Cherry Hill by $200 and $50 on Cinamonson.

THE JUDGE: That makes $171,000 on Cherry Hill and $62,750 on Cinamonson.

MR. ABRAMOWITZ: We will increase each bid $200 that is $62,950 on Cinamonson and $171,200 on Cherry Hill.

MR. GRANT: We go up by $100 on Cherry Hill and $50 on Cinamonson.

THE JUDGE: That is $171,300 for Cherry Hill and $63,000 on Cinamonson.

MR. ABRAMOWITZ: We will increase the bid on each property for $200 as $63,200 on Cinamonson and $171,500 on Cherry Hill.

MR. GRANT: We increase the bid on Cherry Hill by $100 and increase the bid on Cinamonson by $50.

MRABRAMOWITZ: We will again increase the bid on each lease for $200, that is $63,450 on Cinamonson and $171,800 on

Cherry Hill.

MR. GRANT: We increase the bid by $200 on Cherry Hill and $50 on Cinamonson.

THE JUDGE: That rounds off Cherry Hill at $172,000 and on Cinamonson it is $63,500.

MR. ABRAMOWITZ: We will bid $63,700 on Cinamonson and $172,200 on Cherry Hill.

MR. GRANT: We increase the bid on Cherry Hill by $200 and increase the bid on Cinamonson by $50.

THE JUDGE: I now have figures of $172,400 for Cherry Hill and $63,750 on Cinamonson.

MR. ABRAMOWITZ: We will bid $63,950 on Cinamonson and $172,600 on Cherry Hill.

MR. GRANT: We increase the bid by $200 on Cherry Hill and by $50 on Cinamonson.

THE JUDGE: I have $172,800 on Cherry Hill and an even $64,000 on Cinamonson.

MR. ABRAMOWITZ: We will bid $64,200 on Cinamonson and $173,000 on Cherry Hill.

MR. GRANT: We will increase the bid by $5,000 in Cherry Hill and $50 on Cinamonson.

MR. ABRAMOWITZ: We will bid $178,200 on Cherry Hill and $64,450 on Cinamonson.

MR. GRANT: We will increase the bid by $5,000 on Cherry Hill and by $200 on Cinamonson.

MR. ABRAMOWITZ: On the Cherry Hill property we will bid $183,400 and on Cinamonson $64,850.

MR. GRANT: We will increase the bid on Cherry Hill by $5,000 and we increase the bid on Cinamonson to $65,000.

MR. ABRAMOWITZ: We will bid $65,200 on the Cinamonson property and $188,600 on Cherry Hill.

MR. GRANT: I would like to request again that any further bids that I make be conditioned on tying the properties

together.

THE JUDGE: Again I decline.

MR. GRANT: May I speak for a moment on the subject?

We are put at a tremendous disadvantage in bidding under these circumstances for these properties. Builders Emporium which is the operation which would go in the Zartleg store has only one store in the Cherry Hill-Camden marketing area.

From what I have been led to believe the Channel Lumber will have five or more stores in that particular area. Our plans with the Cinamonson store by itself would not fit into our advertising area and if we are required to bid separately on Cinamonson we will not be able to make as high and as favorable a bid as we might otherwise be required.

THE JUDGE: Mr. Gewertz, do you have a suggestion for the court?

MR. GEWERTZ: Yes, I believe that

in the event that you win the Cinamonson without the Cherry Hill property, I think, if that is your condition, there should be a condition that even though you win Cinamonson they should have the right to come in, Channel should have the right to come in and meet that bid and take it if you decline to take it.

MR. ABRAMOWITZ: Your Honor, I object to the entire procedure. There are two stores here. There is a misstatement of facts.

Channel only has one store in the area. I don't know where he got the information that we have give. I don't see what that has to do with the price of the lease. I don't see why a condition should be put on this auction.

These are two separate stores and if Channel wins one and not the other the same conditions should apply there.

MR. GEWERTZ: Suppose if there was not that much difference on the success of

bids on the Cinamonson store that if they lose Cherry Hill that they will withdraw their high bid on Cinamonson and they can get that at the lower bid.

MR. ABRAMOWITZ: No.

MR. GRANT: I would like the record to be clear that I did not state that Channel had five stores in that area. I was misquoted. I stated that I was led to believe that Channel has plans.

THE JUDGE: My instincts tell me that I ought not to disturb the rules of the game while it is being played.

I am not sure of the economic reasons behind this and would keep the properties separate.

MR. GRANT: I object to your ruling.

We will bid no further on Cinamonson.

THE JUDGE: The last and highest bid was offered by Mr. Abramowitz and counsel said that he will not offer any higher bid on the Cinamonson store.

Whose bid was $65,000?

Grant

MR. GRANT: May I, for the record, state what my bid would have been were my requests granted?

THE JUDGE: I have no objection to it, but I will certainly conclude this matter this morning and award the lease to the one that bids the highest amount and not what they would have bid.

The $65,200 is the Channel bid. It would appear that since --

MR. GEWERTZ: I object to what bids would have been. I can make up figures also if it doesn't count.

THE JUDGE: The bidding is over as far as I am concerned since counsel indicates no concern in Cinamonson and that lease is to be awarded to the Channel Co.

MR. GRANT: The records state that I don't indicate that I have no further interest in Cinamonson. It is our position that Cinamonson leaseholders are appropriately ours when the bids were done openly and fairly pursuant to the notice of the

court. We certainly do have an interest in Cinamonson and very much intend to appeal what we heard today and yesterday in court.

MR. ROCHELLE: Your Honor, we could possibly be in a difficult situation if the gentleman from Channel wins the bidding, they are going to have to put up money up front quickly.

I am concerned what will happen six months or two years from now if the Zartleg people win on appeal with their having no money up front. I wonder if maybe --

MR. GWERTZ: I dont understand the concern. The proposed order calls for a closing on Friday.

MR. ABRAMOWITZ: Your Honor, we are in the middle of the bidding on the Cherry Hill property and Cinamonson was just concluded.

The order of confirmation will be presented to Your Honor at some point and if it is reversed on appeal we have to see what will happen.

MR. ROCHELLE: I am talking in the form of a bond if the Zartleg people were to seek a stay of Your Honor's order.

MR. GEWERTZ: There has to be a stay granted and all of the considerations would have to be granted at that time including irreparable harm.

THE JUDGE: We will conclude the bidding and it would appear that Channel has made the highest bid on the Cinamonson property in the amount of $65,200 and I will entertain an order confirming that sale.

MR. GEWERTZ: I have an order here all we have to do is fill in the name of the bidder and the amount.

THE JUDGE: Let's conclude the bidding on the other property first, and then you can hand them both up.

We will now resume the bidding on the Cherry Hill property.

MR. ABRAMOWITZ: I believe the last bid is Channel's at $188,600.

MR. GRANT: I increase the bid to

$190,000.

MR. ABRAMOWITZ: We bid $190,200.

MR. GRANT: I bid $195,000.

MR. ABRAMOWITZ: We bid $195,200.

MR. GRANT: I bid $200,000.

MR. ABRAMOWITZ: We bid $200,200.

MR. HENRY: I bid $205,000.

MR. ABRAMOWITZ: We bid $205,200.

MR. GRANT: We bid $210,000.

MR. ABRAMOWITZ: We bid $210,200.

MR. GRANT: $215,000.

MR. ABRAMOWITZ: We bid $215,200.

MR. GRANT: We have no further bid.

THE JUDGE: It would appear that Channel has the highest bid on the Cherry Hill property of $215,200.

Mr. Gewertz, in the usual terms, I gather that there was a deposit to be made on confirmation of ten percent?

MR. GEWERTZ: Yes.

THE JUDGE: That would be $20,520.

MR. GEWERTZ: Right, in escrow.

THE JUDGE: And on the Cinamonson

property it would be $6,520, I believe.

MR. ABRAMOWITZ: That is $28,040.

I believe that totals up to $28,040, Your Honor.

THE JUDGE: You will want to pick up copies of these orders, I gather?

MR. HENRY: I would like copies if he has them for me now.

MR. GEWERTZ: The orders have not been signed yet.

THE JUDGE: Make arrangements with Mr. Henry and see that he gets a copy.

I will return to my chambers if there is no further business with the court.

MR. ABRAMOWITZ: Thank you, Your Honor.

- - -

ORDER DATED DECEMBER 31, 1976 GRANTING APPLICATION OF DEBTOR AND DEBTOR-IN-POSSESSION TO CONFIRM SALE AND ASSIGNMENT OF LEASE BETWEEN CINNAMINSON SHOPPING CENTER, INC. AND GRANT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	In Proceedings for an Arrangement
W. T. GRANT COMPANY,	:	
	:	No. 75 B 1735
Debtor.	:	
		ORDER

An application having been brought on by an order to show cause dated December 2, 1975 and returnable on December 11, 1975, wherein W. T. Grant Company, as Debtor and Debtor-in-Possession (collectively: "Grant") sought an order authorizing it to sell, assign and transfer to Channel Companies Inc., for the total purchase price of $20,000, or to any other person making a higher and better offer therefor, all of Grant's right, title and interest in and to that certain lease and lease agreement dated May 12, 1960, as supplemented on May 12, 1960 (collectively: the "Lease"), between Cinnaminson Shopping Center, Inc. ("Lessor"), as lessor, and W.T. Grant Company, as lessee, and wherein Grant sought further and ancillary relief with respect to said sale, assignment and transfer, and due notice of hearing having been given by service of said order to show cause upon the Lessor, upon the mortgagee identified in column 3 in Exhibit A annexed to said application, upon Channel Companies, Inc. and upon co-counsel to the Creditors' Committee herein, and after hearing Grant by its attorneys, Messrs. Wachtell, Lipton, Rosen & Katz, by Theodore Gewertz and Laurence D. Cherkis, of counsel, and after hearing the Lessor by its attorneys, Messrs. Tanzer & Friedman, by Hugo Tanzer, of counsel, Channel Companies, Inc., by Jordan Newman, Zartleg Development Corp. by its attorneys, Messrs. Zissu, Lore,

ORDER DATED DECEMBER 31, 1976 GRANTING APPLICATION OF DEBTOR AND DEBTOR-IN-POSSESSION TO CONFIRM SALE AND ASSIGNMENT OF LEASE BETWEEN CINNAMINSON SHOPPING CENTER, INC. AND GRANT

Halper & Robson, by Emanuel Halper, of counsel, and the Creditors' Committee herein by its attorneys, Messrs. Weil, Gotshal and Manges, by Alan Miller, of counsel, and a motion having been brought on by Channel Companies, Inc. by Order to Show Cause dated December 24, 1975 seeking to re-open the bidding for the Lease and said motion having been heard before this Court on December 30, 1975, and said motion having been granted and the bidding for the Lease having been re-opened by this Court on December 30, 1975 and said bidding having been continued before this Court on December 31, 1975, and after hearing Channel Companies, Inc. by its attorneys Messrs. Parker, Chapin and Flattau, by Mark Abramowitz, of counsel, Zartleg Development Corp. by its attorneys, Messrs. Ballon, Stoll & Itzler, by William Henry, of counsel, Grant by its attorneys, Messrs. Wachtell, Lipton, Rosen & Katz, by Theodore Gewertz and Laurence D. Cherkis, of counsel, and the Creditors' Committee herein by its attorneys, Messrs. Weil, Gotshal & Manges, by William Rochelle, of counsel, and upon the testimony of Bernard Tudor, and it appearing that the offer of $65,200 of Channel Companies, Inc is the highest and best offer, and upon the said application and the exhibits thereto and said Order to Show Cause and said testimony and upon all the proceedings had before me, and after due deliberation, and sufficient cause appearing to me therefor, it is

ORDERED, that W. T. Grant Company, as Debtor and Debtor-in-Possession, be, and it hereby is authorized and empowered to sell, assign and transfer to Channel Companies, Inc., for the total purchase price of $65,200, all of Grant's right, title and

BEST COPY AVAILABLE

interest in and to the Lease, with such sale, transfer and assignment to be upon the terms and conditions set forth in Exhibit A hereto and to be evidenced by the Assignment and Assumption Agreement in the form annexed hereto as Exhibit B; and it is further

ORDERED, that upon the payment by Grant to Lessor of the sum of $2,175 representing use and occupation charges in an amount equal to the fixed minimum rent reserved in the Lease for the month of November, 1975, the payment by Grant to its maintenance contractor of the sum of $460.34 representing equipment maintenance charges incurred by W.T. Grant Company and payable pursuant to the Lease for the period preceding the filing of the petition herein, and conditioned upon the consummation of the sale, assignment and transfer authorized in the preceeding paragraph of this Order, Grant, as Debtor-in-Possession, be, and it hereby is, authorized and empowered to assume the Lease immediately prior to the consummation of said sale, assignment and transfer; and it is further

ORDERED, that upon and after the consummation of said sale, assignment and transfer Grant shall have no liability for any breach or breaches of the Lease occurring on and after the date of consummation of said sale, assignment and transfer; and it is further

ORDERED, that upon the payment by Grant of the sums authorized to be paid pursuant to the second decretal paragraph of this Order, Lessor shall be deemed to have waived any and all rights to claim and shall be precluded and estopped from claiming that any default occurred or existed under the Lease prior to December 1, 1975; and it is further

ORDER DATED DECEMBER 31, 1976 GRANTING APPLICATION OF DEBTOR AND DEBTOR-IN-POSSESSION TO CONFIRM SALE AND ASSIGNMENT OF LEASE BETWEEN CINNAMINSON SHOPPING CENTER, INC. AND GRANT

ORDERED, that Grant shall have no liability [illegible] from use and occupation of the premises demised under the lease for the month of December, 1975 or thereafter.

Dated: New York, New York
December 31, 1975

Bankruptcy Judge

EXHIBIT A TO ORDER - TERMS AND CONDITIONS OF SALE

TERMS AND CONDITIONS OF SALE

1. The deposit of 10% of the purchase price, which has been paid by Channel Companies Inc ("Offeror") to Grant shall be held in escrow by Messrs. Wachtell, Lipton, Rosen & Katz subject to the within terms and conditions of sale.

2. On the business day next following the entry of the pre-fixed Order by the Court:

(a) Messrs. Wachtell, Lipton, Rosen & Katz shall release the aforesaid deposit to Grant;

(b) the balance of the purchase price shall be paid by Offeror to Grant by certified or bank check; and

(c) the Assignment and Assumption Agreement in the form annexed to the pre-fixed Order as Exhibit B shall be executed and delivered.

3. All adjustments to be made between Grant and Offeror in connection with the Assignment and Assumption Agreement shall be as of December 1, 1975.

4. In the event that Grant is unable for any reason whatsoever (other than the willful default of Grant) to consummate the transaction and to execute and deliver the Assignment and Assumption Agreement on the date provided for in paragraph 2 above, Messrs. Wachtell, Lipton, Rosen & Katz shall, unless otherwise directed in a writing signed by Grant and Offeror (a) return to Offeror the deposit referred to in paragraph 1 above less an

of the mutual covenants herein set forth and for $10 and other good and valuable considerations, the receipt of which is hereby acknowledged,

IT IS AGREED:

1. Assignor hereby sells, assigns and transfers to Assignee any and all of Assignor's right, title and interest in and to the Lease. The foregoing sale, assignment and transfer is made without any recourse whatsoever to Assignor and without any representations and warranties whatsoever.

2. Assignee hereby accepts the foregoing sale, assignment and transfer and assumes and agrees to pay and perform all liabilities and obligations under the Lease arising on and after December 1, 1975 or otherwise attributable to the period commencing on December 1, 1975 and continuing thereafter. Assignee shall indemnify and save Assignor harmless from and against any and all claims, demands, actions, causes of action, suits, proceedings, damages, liabilities and costs and expenses of every nature whatsoever (including, without limitation, reasonable attorneys' fees) arising on or after December 1, 1975 and relating to the Lease or the premises demised thereunder.

3. All taxes and other governmental charges and fees, including, without limitation, any and all transfer taxes, stamp taxes, sales taxes and recording fees, relating to the transaction evidenced by this agreement shall be paid by Assignee.

4. This agreement shall be binding upon the successors and assigns of the parties hereto. Assignor and Assignee shall execute and deliver such further and additional instruments,

EXHIBIT B TO ORDER - ASSIGNMENT AND ASSUMPTION AGREEMENT

ASSIGNMENT AND ASSUMPTION AGREEMENT

AGREEMENT made this day of December, 1975, but ... of December 1, 1975, between W.T. GRANT COMPANY, as Debtor ... Debtor-in-Possession ("Assignor") and ("Assignee").

R E C I T A L S :

A. W.T. Grant Company, as Lessee, was a party to a lease and lease agreement dated May 12, 1960, as supplemented on May 12, 1960 (collectively: the "Lease"), with Cinnaminson Shopping Center, Inc.

B. W.T. Grant Company filed a petition under Chapter XI of the Bankruptcy Act and Rule 11-6 of the Chapter XI Rules on October 2, 1975 with the United States District Court for the Southern District of New York (the "Court") and was authorized to continue the operation of its properties as Debtor-in-Possession.

C. Assignor desires to sell, assign and transfer the Lease to Assignee and Assignee desires to accept said sale, assignment and transfer upon the terms and conditions hereinafter set forth.

D. The court has authorized and empowered Assignor to execute and deliver this agreement.

NOW, THEREFORE, in consideration of the premises and

amount (the "Deducted Amount") equal to the fixed minimum rent in the sum of $2,175 payable under the Lease for the month of December, 1975 and (b) remit the Deducted Amount to Grant, whereupon neither Grant nor Offeror shall have any further liability to the other.

5. Messrs. Wachtell, Lipton, Rosen & Katz shall have no liability as escrowee except for their own bad faith or willful misconduct and shall be entitled to rely upon any writing signed by both Grant and Offeror.

EXHIBIT B TO ORDER - ASSIGNMENT AND ASSUMPTION AGREEMENT

agreements and other documents as may be necessary to evidence or carry out the provisions of this agreement.

W.T. GRANT COMPANY, Debtor and Debtor-in-Possession

By _____

ATTEST:

_____

By _____

ATTEST:

_____

[Acknowledgements]

ORDER DATED DECEMBER 31, 1975 GRANTING APPLICATION OF DEBTOR AND DEBTOR-IN-POSSESSION TO CONFIRM SALE AND ASSIGNMENT OF LEASE BETWEEN WOODCREST HOMES, INC. AND GRANT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	In Proceedings for an Arrangement
W. T. GRANT COMPANY,	:	
Debtor.	:	No. 75 B 1735
		ORDER

An application having been brought on by an order to show cause dated December 2, 1975 and returnable on December 11, 1975, wherein W. T. Grant Company, as Debtor and Debtor-in-Possession (collectively: "Grant") sought an order authorizing it to sell, assign and transfer to Channel Companies Inc., for the total purchase price of $20,000, or to any other person making a higher and better offer therefor, all of Grant's right, title and interest in and to that certain lease and lease agreement dated July 15, 1960 (the "Lease"), between Woodcrest Homes, Inc. ("Lessor"), as lessor, and W. T. Grant Company, as lessee, and wherein Grant sought further and ancillary relief with respect to said sale, assignment and transfer, and due notice of hearing having been given by service of said order to show cause upon the Lessor, upon the mortgagee identified in column 3 in Exhibit A annexed to said application, upon Channel Companies, Inc. and upon co-counsel to the Creditors' Committee herein, and after hearing Grant by its attorneys, Messrs. Wachtell, Lipton, Rosen & Katz, by Theodore Gewertz and Laurence D. Cherkis, of counsel, and after hearing Channel Companies, Inc., by Jordan Newman, Zartleg Development Corp. by its attorneys, Messrs. Zissu, Lore, Halper & Robson, by Emanuel Halper, of counsel, and the Creditors' Committee herein by its attorneys, Messrs. Weil, Gotshal and Manges, by Alan

ORDER DATED DECEMBER 31, 1975 GRANTING APPLICATION OF DEBTOR AND DEBTOR-IN-POSSESSION TO CONFIRM SALE AND ASSIGNMENT OF LEASE BETWEEN WOODCREST HOMES, INC. AND GRANT

Miller, of counsel, and a motion having been brought on by Channel Companies, Inc. by Order to Show Cause dated December 24, 1975 seeking to re-open the bidding for the Lease and said motion having been heard before this Court on December 30, 1975, and said motion having been granted and the bidding for the Lease having been re-opened by this Court on December 30, 1975 and said bidding having been continued before this Court on December 31, 1975, and after hearing Channel Companies, Inc. by its attorneys Messrs. Parker, Chapin and Flattau, by Mark Abramowitz, of counsel, Zartleg Development Corp. by its attorneys, Messrs Ballon, Stoll & Itzler, by William Henry, of counsel, Grant by its attorneys, Messrs. Wachtell, Lipton, Rosen & Katz, by Theodore Gewertz and Laurence D. Cherkis, of counsel, and the Creditors' Committee herein by its attorneys, Messrs. Weil, Gotshal & Manges, by William Rochelle, of counsel, and upon the testimony of Bernard Tudor, and it appearing that the offer of $215,200 of Channel Companies, Inc. is the highest and best offer, and upon the said application and the exhibits thereto and said Order to Show Cause and said testimony and upon all the proceedings had before me, and after due deliberation, and sufficient cause appearing to me therefor, it is

ORDERED, that W. T. Grant Company, as Debtor and Debtor-in-Possession, be, and it hereby is authorized and empowered to sell, assign and transfer to Channel Companies Inc., for the total purchase price of $215,200, all of Grant's right, title and interest in and to the Lease, with such sale, transfer and assignment to be upon the terms and conditions set forth in Exhibit A

hereto and to be evidenced by the Assignment and Assumption Agreement in the form annexed hereto as Exhibit B; and it is further

ORDERED, that upon the payment by Grant to Lessor of the sum of $2,591.67 representing use and occupation charges in an amount equal to the fixed minimum rent reserved in the Lease for the month of November, and the payment by Grant to its maintenance contractor of the sum of $240.08 representing equipment maintenance charges incurred by W.T. Grant Company and payable pursuant to the Lease for the period preceding the filing of the petition herein, and conditioned upon the consummation of the sale, assignment and transfer authorized in the preceeding paragraph of this Order, Grant, as Debtor-in-Possession, be, and it hereby is, authorized and empowered to assume the Lease immediately prior to the consummation of said sale, assignment and transfer; and it is further

ORDERED, that upon and after the consummation of said sale, assignment and transfer Grant shall have no liability for any breach or breaches of the Lease occurring on and after the date of consummation of said sale, assignment and transfer; and it is further

ORDERED, that upon the payment by Grant of the sums authorized to be paid pursuant to the second decretal paragraph of this Order, Lessor shall be deemed to have waived any and all rights to claim and shall be precluded and estopped from claiming that any default occurred or existed under the Lease prior to December 1, 1975; and it is further

ORDER DATED DECEMBER 31, 1975 GRANTING APPLICATION OF DEBTOR AND DEBTOR-IN-POSSESSION TO CONFIRM SALE AND ASSIGNMENT OF LEASE BETWEEN WOODCREST HOMES, INC. AND GRANT

ORDERED, that Grant shall have no liability arising from use and occupation of the premises demised under the Lease for the month of December, 1975 or thereafter.

Dated: New York, New York
December 31, 1975

John J. Hoey
Bankruptcy Judge

EXHIBIT A TO ORDER - TERMS AND CONDITIONS OF SALE

TERMS AND CONDITIONS OF SALE

1. The deposit of 10% of the purchase price, which has been paid by ("Offeror") to Grant shall be held in escrow by Messrs. Wachtell, Lipton, Rosen & Katz subject to the within terms and conditions of sale.

2. On the business day next following the entry of the pre-fixed Order by the Court:

(a) Messrs. Wachtell, Lipton, Rosen & Katz shall release the aforesaid deposit to Grant;

(b) the balance of the purchase price shall be paid by Offeror to Grant by certified or bank check; and

(c) the Assignment and Assumption Agreement in the form annexed to the pre-fixed Order as Exhibit B shall be executed and delivered.

3. All adjustments to be made between Grant and Offeror in connection with the Assignment and Assumption Agreement shall be as of December 1, 1975.

4. In the event that Grant is unable for any reason whatsoever (other than the willful default of Grant) to consummate the transaction and to execute and deliver the Assignment and Assumption Agreement on the date provided for in paragraph 2 above, Messrs. Wachtell, Lipton, Rosen & Katz shall, unless otherwise directed in a writing signed by Grant and Offeror (a) return to Offeror the deposit referred to in paragraph 1 above less an amount (the "Deducted Amount") equal to the fixed minimum

rent in the sum of $2,591.67 payable under the Lease for the month of December, 1975 and (b) remit the Deducted Amount to Grant, whereupon neither Grant nor Offeror shall have any further liability to the other.

5. Messrs. Wachtell, Lipton, Rosen & Katz shall have no liability as escrowee except for their own bad faith or willful misconduct and shall be entitled to rely upon any writing signed by both Grant and Offeror.

EXHIBIT B TO ORDER - ASSIGNMENT AND ASSUMPTION AGREEMENT

ASSIGNMENT AND ASSUMPTION AGREEMENT

AGREEMENT made this day of December, 1975, but as of December 1, 1975, between W.T. GRANT COMPANY, as Debtor and Debtor-in-Possession ("Assignor") and ("Assignee").

R E C I T A L S :

A. W.T. Grant Company, as Lessee, was a party to a lease and lease agreement dated July 15, 1960 (the "Lease"), with Woodcrest Homes, Inc., as lessor.

B. W.T. Grant Company filed a petition under Chapter XI of the Bankruptcy Act and Rule 11-6 of the Chapter XI Rules on October 2, 1975 with the United States District Court for the Southern District of New York (the "Court") and was authorized to continue the operation of its properties as Debtor-in-Possession.

C. Assignor desires to sell, assign and transfer the Lease to Assignee and Assignee desires to accept said sale, assignment and transfer upon the terms and conditions hereinafter set forth.

D. The court has authorized and empowered Assignor to execute and deliver this agreement.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants herein set forth and for $10 and other

EXHIBIT B TO ORDER - ASSIGNMENT AND ASSUMPTION AGREEMENT

good and valuable considerations, the receipt of which is hereby acknowledged,

IT IS AGREED:

1. Assignor hereby sells, assigns and transfers to Assignee any and all of Assignor's right, title and interest in and to the Lease. The foregoing sale, assignment and transfer is made without any recourse whatsoever to Assignor and without any representations and warranties whatsoever.

2. Assignee hereby accepts the foregoing sale, assignment and transfer and assumes and agrees to pay and perform all liabilities and obligations under the Lease arising on and after December 1, 1975 or otherwise attributable to the period commencing on December 1, 1975 and continuing thereafter. Assignee shall indemnify and save Assignor harmless from and against any and all claims, demands, actions, causes of action, suits, proceedings, damages, liabilities and costs and expenses of every nature whatsoever (including, without limitation, reasonable attorneys' fees) arising on or after December 1, 1975 and relating to the Lease or the premises demised thereunder.

3. All taxes and other governmental charges and fees, including, without limitation, any and all transfer taxes, stamp taxes, sales taxes and recording fees, relating to the transaction evidenced by this agreement shall be paid by Assignee.

4. This agreement shall be binding upon the successors and assigns of the parties hereto. Assignor and Assignee shall execute and deliver such further and additional instruments, agreements and other documents as may be necessary to evidence

EXHIBIT B TO ORDER - ASSIGNMENT AND ASSUMPTION AGREEMENT

or carry out the provisions of this agreement.

W.T. GRANT COMPANY, Debtor
and Debtor-in-Possession

By _____

ATTEST:

_____

By _____

ATTEST:

_____

[Acknowledgements]

NOTICE OF MOTION TO REARGUE AND MODIFY ORDERS GRANTING SALE AND ASSIGNMENT OF LEASES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of	:	In Proceedings for an Arrangement
W. T. GRANT COMPANY,	:	75 B 1735
Debtor.	:	NOTICE OF MOTION FOR REARGUMENT

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavits and exhibits thereto of Roger L. Zissu and Solomon Rogoff sworn to January 9 and January 7, 1976, respectively; the order presented to the Court by Zartleg Development Corp. ("Zartleg") to confirm the sale of certain leases of the debtor-in-possession, a copy of which is attached hereto as Exhibit A to this motion; the Order to Show Cause of the debtor dated December 2, 1975; the Order to Show Cause of Channel Industries, Inc. ("Channel") dated December 24, 1975, this Court's two orders dated and entered December 31, 1975 confirming the sale by the debtor-in-possession of its leases to stores numbers 193 and 331 to Channel, and upon all prior papers, proceedings and hearings had herein with respect to the foregoing, the undersigned will move at a motion part of this Court before the Hon. John J. Galgay, Room 234, on January 26, 1976 at 10:30 A.M. or as soon thereafter as counsel can be heard, for an order permitting Zartleg to reargue such December 31, 1975 orders and modifying the same to the extent of confirming the sale of such leases to Zartleg in accordance with the bidding closed on December 11, 1975 upon the grounds

NOTICE OF MOTION TO REARGUE AND MODIFY ORDERS GRANTING SALE AND ASSIGNMENT OF LEASES

(i) that Court's prior decision to re-open the bidding was legally erroneous (ii) that there is new evidence supporting the contention of Zartleg that the winning bids of Zartleg on December 11, 1975 were equal to the fair market value of the properties in question and (iii) that this Court should not permit Channel to secure the fruits of its unclean hands and/disqualify it from doing so, and granting to Zartleg and the other concerned parties such other and further relief as may be just and proper.

Dated: New York, New York
January 9, 1976

COWAN, LIEBOWITZ & LATMAN, P.C.

By _____
A Member of the Firm
200 East 42nd Street
New York, New York 10017

TO:

Messrs. Wachtell, Lipton, Rosen & Katz
299 Park Avenue
New York, New York 10010

Messrs. Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10017

Messrs. Taenzer & Friedman
Rt. 130 & Riverton Road
Cinnaminson, New Jersey 08077

Messrs. Ballon, Stoll & Itzler
1180 Avenue of the Americas
New York, New York 10036

Messrs. Parker, Chapin & Flattau
530 Fifth Avenue
New York, New York 10036

AFFIDAVIT OF ROGER L. ZISSU, ESQ., FOR ZARTLEG DEVELOPMENT CORP., IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of W. T. GRANT COMPANY, Debtor.	In Proceedings for an Arrangement 75 B 1735 AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROGER L. ZISSU, being duly sworn, says:

1. I am a member of the Bar of this Court and of the firm of Cowan, Liebowitz & Latman, P.C. who have just been retained by movant Zartleg Development Corp. ("Zartleg") to represent them further in these proceedings.

2. I make this affidavit in support of Zartleg's instant motion to reargue and modify the two orders of this Court entered December 31, 1975 with respect to the reopening of bidding for and confirmation of sale of two leasehold properties of the debtor-in-possession to stores number 193 (Cinnaminson, New Jersey) and 331 (Cherry Hill, New Jersey).

3. I intend to file shortly with the Court an appropriate stipulation of substitution of my firm to represent Zartleg herein which will, hopefully, be approved by the return date of this motion.

4. I will not belabor the arguments previously made by Zartleg in opposition to the granting of the earlier motion of Channel Companies, Inc. ("Channel") to reopen the bidding that had closed on December 11, 1975 except to refer briefly

below to some of the prior record so that the Court can now reevaluate what has gone on in the context of what Zartleg considers to be new evidence and determine whether Channel should be disqualified from securing the fruits of its questionable behavior before this Court.

5. The new evidence is set forth in the affidavit attached hereto of Mr. Solomon Rogoff, President of Vornado, Inc. which owns and controls Zartleg.

6. Mr. Rogoff reveals that on December 12, 1975 after the December 11 bidding had closed, he received a telephone call from the Chairman of the Board of Channel who apparently attempted to obtain Zartleg's agreement (i) to "split" the two leases in question, not at anything like the prices bid for them by Channel on December 31 when the bidding reopened and (ii) to get together with Channel on similar future matters. I have been told that these facts were not presented to the Court earlier in the record because prior counsel were not fully aware of them between the Christmas Eve Order to Show Cause and the return date of the Tuesday after the Holiday Weekend.

7. It would now appear that it was only when this approach was rejected out of hand by Zartleg that Channel sought to reopen bidding and increase its bids over those made by it on December 11.

8. Zartleg considers that this was not only an attempt by Channel to engage in collusion vis-a-vis the bidding in Court but an attempt to enter into an agreement to divide markets that would have been in blatant violation of the Anti-Trust Laws.

9. Now, in light of this new evidence, we respectfully request the Court to reconsider not only Channel's conduct in the first bidding but also the uninhibited representations it has made to the Court in support of its motion to reopen bidding through testimony and the affidavit of its attorneys:

> (i) "Significantly, neither the order to show cause, the application in support thereof nor Exhibit A annexed to the application, indicated that oral bids would be accepted at the hearing on December 11, 1975, or that the Court had authority to entertain such oral bids;" (Levin Aff't December 23, 1975 par. 3); and

(ii) claims of no opportunity to submit bids on December 11 and grossly inadequate prices offered by Zartleg (the affidavit, testimony and supporting memorandum of law of Channel iterate and reiterate these claims).

10. We respectfully submit that these patently disingenuous statements really go too far.

11. Zartleg recognizes the Court's concern with the well being of the creditors of Grant. But the above facts, in the light of Mr. Rogoff's affidavit, raise more than a question of the legality of Channel's actions under the Anti-Trust laws, but more importantly raise the question of whether Channel has deceived the Court and made the Court itself an instrument of its very questionable scheme. This would involve not only an issue for an anti-trust law enforcement agency but one of whether the Court's own jurisdiction and powers have been abused.

12. Zartleg, also, respectfully believes that the foregoing demonstrates that its offers of $26,500 per lease on December 11, 1975 were equal to the fair market value and that Channel's offers on December 31 reflected only the value

to Channel of accomplishing indirectly through the Court an anti-competitive scheme that it could not accomplish through Zartleg. The prices paid by Channel are the prices it is willing to pay to anyone, maybe even to Zartleg itself, to keep the Builders Emporium stoves out of the areas in question.

13. We submit that this Court as one of equity should reconsider Channel's conduct. Zartleg strongly objects to the fact that the bidding was reopened at all. As I understand it from those present on December 30, this Court rejected every one of Channel's arguments that the procedure and bidding on December 11 was anything but entirely proper and that Zartleg's conduct throughout has been, equally, anything but entirely proper.

14. Channel's conduct, in first offering $20,000 per lease on the assumption that there would be no bidding, in discontinuing its bidding on December 11 at $26,000 per lease despite the authority of those present to bid (which the Court has, I understand, in effect now found to be the case), in thereafter attempting to "split" the two leases with Zartleg presumably at a cost to itself of the $26,500 for one lease that Zartleg had successfully bid on December 11, and, upon rejection of this unsavory approach, in making to the Court repeated, questionable statements about what had occurred, all militate very strongly in favor of a disqualification of Channel from obtaining the fruits of its unclean hands.

15. Zartleg has moved as expeditiously as possible after the entry of December 31, 1975 orders and the closings which took place immediately thereafter to bring on this motion.

AFFIDAVIT OF ROGER L. ZISSU, ESQ., FOR ZARTLEG DEVELOPMENT CORP., IN SUPPORT OF MOTION

16. There has been no prior request for this relief by Zartleg.

/s/

ROGER L. ZISSU

Sworn to before me this

9 day of January, 1976.

Notary Public

CRISTOPHER RAHTZ
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-4619982
Qual. in Kings Co. Cert. Filed N.Y. Co.
Commission Expires March 30, 1976

AFFIDAVIT OF SOLOMON ROGOFF, FOR ZARTLEG DEVELOPMENT CORP., IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

IN re: : In Proceedings for an Arrangement

W. T. GRANT COMPANY, : 75 B 1735

Debtor. : AFFIDAVIT

----------X

STATE OF NEW JERSEY)
: ss.:
COUNTY OF BERGEN)

SOLOMON ROGOFF, being duly sworn, deposes and says:

1. I am the President of Vornado, Inc., the parent corporation of Zartleg Development Corp. ("Zartleg") and make this affidavit in support of Zartleg's instant application by order to show cause to reargue the granting of the previous motion of Channel Companies, Inc. ("Channel") to reopen the competitive bidding for a proposed sale and assignment by the debtor in possession of its leases to Store No. 193 and Store No. 331. I have been advised that this Court's order granting such prior motion of Channel and confirming the sale and assignment of such leases to Channel was entered on December 31, 1975. We also respectfully request that a temporary stay be issued preventing any further action by Channel with respect to these properties until the return date of this motion.

2. In light of the facts and new evidence set forth below and the outrageous conduct of Channel, we believe that the Court should modify its December 31, 1975 order. Channel represented to the Court that its initial offer of $40,000 for both the leases in

question was fair. However, after losing in the December 11 bidding, it took the inconsistent position of claiming that its own offer was grossly inadequate. In addition, we believe Channel has used the powers of this Court to further an illegal scheme in order to prevent Vornado from competing with it for the do-it-yourself retail market in New Jersey. We believe that the Court in permitting the reopening of bidding has been misled as to the true and fair value of the leases in question and that Channel has skillfully succeeded in executing a predatory plan designed to exclude Vornado from competing with it in certain marketing areas by submitting to the Court bids for the leases in question in amounts that have no relationship to fair or reasonable value. The price paid by Channel on the reopening of the bidding is not the fair market value of the leases, but the price that Channel is willing to pay to limit competition by preventing the opening of new Builders Emporium units in New Jersey. Furthermore, as shown below, this price is not only what Channel was willing to pay to the debtor-in-possession but to anyone, including, Vornado itself, to eliminate competition.

3. Vornado, Inc. whose shares are traded on the New York Stock Exchange is one of the nation's 25 largest retailers with overall sales in 1975 expected to exceed $1 billion. It is best known as the owner and operator of Two Guys Discount Department Stores as well as of the Builders Emporium chain of do-it-yourself, leisure-time home centers. The Builders Emporium chain, successful for over 20 years on the West Coast, has recently been brought to the East Coast (1972), primarily in New Jersey where it presently operates five (5) stores.

AFFIDAVIT OF SOLOMON ROGOFF, FOR ZARTLEG DEVELOPMENT CORP., IN SUPPORT OF MOTION

4. In my position as President of Vornado, I have recently taken charge of all real estate acquisitions and related matters in the company. Zartleg is one of several real estate companies through which we acquire various new sites for our business.

5. As indicated in the affidavit of Roger L. Zissu, Esq. submitted herewith, Vornado and Zartleg were, quite frankly, shocked that after successfully bidding and obtaining judicial approval of the sale and assignment to Zartleg of the two Grant leases in question, the court permitted the reopening of bidding and eventual confirmation of the proposed sale and assignment of these leases to Channel.

6. In working with our counsel to thoroughly review this entire matter - something which was difficult to accomplish in the one working day between the service of Channel's order to show cause dated December 24, 1975 and the return date thereof on December 30, 1975 -- I have now reported to our counsel the substance of a telephone call I received from the Chairman of the Board of Channel. This call was received shortly after we were determined by this Court to have been the successful bidder for the leases in question at a hearing held on December 11, 1975. My counsel advise me that this telephone conversation constitutes new evidence, and that it should have a substantial bearing on our instant motion. I would like to note that I am not a lawyer and was unaware of the legal significance of this conversation at the time it occurred.

AFFIDAVIT OF SOLOMON ROGOFF, FOR ZARTLEG DEVELOPMENT CORP., IN SUPPORT OF MOTION

7. On December 12, 1975 Mr. Lou Slater, the Chairman of the Board of Channel telephoned me at my office in Garfield, New Jersey. Mr. Slater mentioned something about Vornado's successful bidding for the two Grant leases on the previous day in court and stated that he had not known that Vornado was interested in acquiring new sites for 25,000 sq. ft. stores. I responded that our Builders Emporium chain was moving toward the acquisition of stores of this size throughout New Jersey. Mr. Slater then said that if he had known this, we could have gotten together about purchasing the two leases in question as well as other situations in the future. He also thought it was a good idea for us to discuss where we were going and in what areas.

8. At this point, I told Mr. Slater that I had instructed Vornado's real estate department to pursue very aggressively sites that would be of interest to the company wherever they were located and understood they were moving ahead to accomplish the same.

9. Mr. Slater in substance, then said, "how about splitting the two stores" that we had successfully acquired through the Court from Grant. My reply was, why should we be discussing this or split anything when Vornado already owned these stores.

10. During this conversation the question of whether Channel would appeal our successful bid also came up. On this, Mr. Slater stated that his lawyer had been very embarrassed by the fact that there was other bidding for these leases on December 11 when Channel had expected its $40,000 offer simply

to be accepted without opposition. He also indicated that Channel would not be appealing and suggested that we have lunch sometime in the near future to discuss various matters. Tentative plans were made for us to meet in early January 1976.

11. In light of this telephone call, I concluded that, with Court approval and the indication from Mr. Slater that the matter was closed, we could proceed with the steps to open these new stores in time for Easter business.

12. Moreover, in reliance upon the Court's December 11, 1975 approval of our offers, Vornado had by December 24, 1975 already expended $52,138.26 in preparing the new stores for the opening of business at the earliest point. Attached hereto as Exhibit B, is a schedule setting forth and describing the amounts comprising this expenditure.

13. Against this background I was extremely upset later, to say the least, when I learned of Channel's Christmas Eve motion (made when our executive offices were closed) to reopen the bidding on the two Grant leases. I was also distressed that the motion would be heard on the second day after the long Christmas weekend when some of our key people concerned with real estate and legal matters were on vacation and out-of-town.

14. I was also very surprised to be told that on the very day of the entry of the order by the court confirming the sale of these stores to Channel, the whole transaction was consummated and closed, namely on New Year's Eve, December 31, 1975.

AFFIDAVIT OF SOLOMON ROGOFF, FOR ZARTLEG DEVELOPMENT CORP., IN SUPPORT OF MOTION

15. Vornado now finds itself in the position of dealing with what may be more than a fait accompli. It has not only been denied the leases but been damaged substantially in the process. Nevertheless, in view of all that has gone on so quickly, we are immediately filing a notice of appeal and will take prompt and appropriate steps to reargue and do anything else in our power to rectify the wrong that has occurred. We now consider the court's December 31, 1975 order to be not only an injustice to our company but also a misuse of the Bankruptcy Laws and of the jurisdiction and power of this Court in making the court without its knowledge an apparent instrument of Channel in accomplishing a restraint upon trade in violation of the Anti-Trust Laws.

SOLOMON ROGOFF

Sworn to before me this
7th day of January, 1976.

Notary Public

PAULINE POTOSNAK
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires July 3, 1977

EXHIBIT A TO MOTION - ORDER PRESENTED
TO COURT BY ZARTLEY DEVELOPMENT CORP.

(Reproduced herein at pages A-35 - A-37.)

EXHIBIT B TO MOTION - SCHEDULE OF EXPENDITURE IN PREPARING NEW STORES

Utilities payroll	$ 191.74
Measurements as build conditions of stores	277.63
Drafting and design expense	2,115.85
Purchasing	448.00
Supervision of payroll expense	606.04
Operational design team	6,910.00
Fixtures fabricated	41,314.00
Utilities on location (Cinnaminson)	275.00
	$52,138.26

AFFIDAVIT OF MARK ABRAMOWITZ, ESQ., FOR CHANNEL COMPANIES, INC., IN OPPOSITION TO MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

In the Matter of

: In Proceedings for an Arrangement

W.T. GRANT COMPANY,

: 75 B 1735

Debtor.

: AFFIDAVIT

- x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MARK ABRAMOWITZ, being duly sworn, deposes and says:

1. I am a member of the firm of Parker, Chapin and Flattau, attorneys for Channel Companies, Inc. ("Channel") and I make this affidavit in opposition to the motion made by Zartleg Development Corp. ("Zartleg") to "reargue" two orders of this Court dated and entered Decmeber 31, 1975, which confirmed the sale and assignment by W.T. Grant Company ("Grant"), as debtor-in-possession, of its lease to store number 193 located in Cinnaminson, New Jersey and its lease to store number 331 located in Cherry Hill, New Jersey, to Channel.

2. In support of its application, Zartleg claims that it has "new evidence", and it is urged that this Court "reevaluate what has gone on in the context" of this alleged "new evidence". However, it is demonstrated below that none of this alleged "evidence" is "new", and in any event, such "evidence" is insufficient, as a matter of law, to support any reconsideration of the December 31, 1975 orders.

AFFIDAVIT OF MARK ABRAMOWITZ, ESQ., FOR CHANNEL COMPANIES, INC., IN OPPOSITION TO MOTION

BACKGROUND FACTS

3. On October 2, 1975, Grant filed with this Court a petition for an arrangement under Section 322 of Chapter XI Rules. At the time of this filing, Grant leased and operated approximately 1,070 stores located in 40 states. After the entry of orders authorizing Grant to (i) continue to operate its business and manage its properties as debtor-in-possession and (ii) conduct going-out-of-business sales in and to surrender possession of 579 stores, Grant embarked upon a program to assign the leases of the stores, covered by these orders to parties willing to pay a cash consideration for the assignment and to assume the obligations under the leases. Channel, among others, was solicited by Grant to submit offers to purchase certain of the leases, and prior to December 2, 1975, Channel, by its counsel, in fact, submitted written bids (each in the amount of $20,000) to purchase the Cinnaminson and Cherry Hill leases.

4. By order to show cause dated December 2, 1975, this Court set a hearing for December 11, 1975 on the question of authorizing the sale of certain leases to the "High Bidder" identified in an exhibit annexed to the application for order to show cause. This exhibit identified Channel as the "High Bidder" for the Cinnaminson and Cherry Hill leases and indicated that there were no other bidders for these leases. Although the order to show cause alluded to "other persons making a higher and better offer", it did not otherwise give notice that Zartleg or any other bidder would be present at the December 11, 1975 hearing to submit oral bids.

5. Consequently, Channel was unaware that there would be any further bids for the subject leases, and therefore, it

It is the position of Zartleg that the Bankruptcy Court improperly reopened the hearing to consider the sale of the leasehold interests, notwithstanding that no sale to Zartleg had been confirmed and, further, that the bankrupt estate and its creditors would have been deprived of the additional realization of $227,400. Zartleg, however, loses sight of a major objective of bankruptcy proceedings, i.e., to maximize realization upon the assets of the bankrupt for the ultimate benefit of the bankrupt's creditors. The District Court's affirmance of the action and orders of the Bankruptcy Court was fully in harmony with this objective, and was therefore proper.

Statement of Facts

The brief of Appellee Channel sets forth in detail the facts presented by the instant appeal. Charles G. Rodman, as Trustee of the Estate of W. T. Grant Company, Bankrupt, (the "Trustee"), requests that the statement of facts contained in Channel's brief be incorporated herein as if set forth fully and at length. The Trustee will limit his statement to the most salient facts pertinent to this appeal.

On October 2, 1975, Grant filed a petition under Chapter XI, Section 322 of the Bankruptcy Act, 11 U.S.C. §722, and Chapter XI Rule 11-6, 415 U.S. 1005 (1974). Grant was at that time engaged in the management and operation of a nationwide retail store chain comprising 1,070 stores in forty

states and employed approximately 65,000 persons. (A12). Almost immediately subsequent to the filing of the Chapter XI petition, Grant undertook a program to contract its retail operations and to close those stores which it had determined did not fit in its plan for reorganization. Thereafter and pursuant to an order dated April 13, 1976, Grant was adjudged a bankrupt under the Bankruptcy Act. (A226). On that same date, the Trustee qualified and has since acted in the capacity of Trustee.

Prior to the adjudication of bankruptcy and as a part of the aborted reorganization program, Grant undertook to offer for sale assets of the estate, including the sale by assignment of leasehold interests covering retail outlets. In connection therewith, hearings were held before the Bankruptcy Court to consider such sales. (E.g., A8ff).

In many instances, the contracts of lease covering the leasehold interests included provisions favorable to the lessee and, therefore, were attractive to other retail organizations. The program adopted for the sale and assignment of leasehold interests was highly successful. As reflected in the record of the Grant case in the Bankruptcy Court, the program is expected to yield to the bankrupt estate a net sum in excess of $10,000,000. During the hearings held before the Bankruptcy Court, twenty-five (25) contracts of lease were sold for amounts ranging between $200,000 and $925,000 each.

The benefits which will inure to creditors of the bankrupt are self-evident.

The two contracts of lease involved in the appeal at bar were first offered for sale and assignment at the hearing held before the Bankruptcy Court on December 11, 1975. (A55-73). As stated, the aggregate offer of Zartleg was the highest offer received that day. Although Channel did participate in the hearing, it did not submit any offer in excess of the offers made by Zartleg. No orders confirming the sales to Zartleg were made by the Bankruptcy Court at the hearing or thereafter, although such an order was noticed for settlement. (A33-37). On December 24, 1975, Channel obtained an order to show cause why the hearing should not be reopened to consider additional offers for the leasehold interests, advising the Court that it was prepared to offer $105,000, or $52,000 more than Zartleg, for the two contracts of lease. (A76, 80, 109). After considering the application of Channel and the substantial and material difference between the $53,000 offered by Zartleg and the $105,000 offered by Channel, the Bankruptcy Court, in the exercise of its allowable discretion, reopened the hearing to receive additional offers for the two leasehold interests. (A 108).

The reopened hearing was held on December 31, 1975, with both Channel and Zartleg submitting new and higher offers for the purchase of the leasehold interests. The highest aggregate offer received was from Channel and totalled $280,400. (A 116-138, 140, 149).

The sales to Channel were confirmed by the two orders dated December 31, 1975. (A 139-147, 148-156). Zartleg filed appeals from the orders of confirmation (A 213-4), but did not obtain a stay of execution of the said orders. Consequently, the sales were consummated, Channel is presently in possession of the respective leasehold estates and the bankrupt estate realized an additional $227,400 that would have been lost had the Bankruptcy Court been constrained to accept the aggregate offer of Zartleg in the sum of $53,000.

Zartleg also sought reargument before the Bankruptcy Court. (A 157ff). Reargument was denied by the Bankruptcy Court by order dated March 2, 1976. (A208-212). As stated, Zartleg also appealed to the District Court from the order of March 2, 1976. (A224-4).

The three appeals were heard by District Judge Wyatt. On May 17, 1976, the District Court rendered its memorandum decision and order affirming the orders of the Bankruptcy Court. (A226-8). Thereafter, Zartleg initiated the instant appeal.

I

THE BANKRUPTCY COURT DID NOT ABUSE ITS DISCRETION BY REOPENING THE HEARING WHICH RESULTED IN AN ADDITIONAL RECOVERY OF $227,400 FOR THE BANKRUPT ESTATE

The facts pertinent to the instant appeal establish beyond doubt that the Bankruptcy Court acted well within the bounds of allowable discretion.

An order approving the sale of property of a bankrupt estate may only be reversed upon a finding that the court below abused its discretion. In re Realty Foundation Inc., 75 F.2d 286 (2d Cir. 1935); In re McGrath, 226 F.2d 959 (3rd Cir. 1955); Prentice v. Boteler, 141 F.2d 175 (9th Cir. 1944). Moreover, it is axiomatic that in matters involving the sale of property, the bankruptcy court is vested with a broad range of discretion. Thus, in In re Berry & Moser Const. Co., 114 F. Supp. 449 (D. Me. 1953), the Court stated:

> "The grant or denial of confirmation of a sale by a Referee is, to a great extent, a matter of business administration and practical management, necesarily involving the discretion of the Referee." 114 F. Supp. at 451.

Similarly, in Jacobsohn v. Larkey, 245 F.538 (3rd Cir. 1917), the governing principle was aptly stated as follows:

> "When in a given case a price is grossly inadequate and when upon that ground confirmation should be refused, are matters within the judgment and discretion of the tribunal ordering the sale." 245 F. at 542.

See also, In re McGrath, supra; Prentice v. Boteler, supra; In re Realty Foundation, Inc., supra; In re New Strand Theater, 109 F. Supp. 350 (S.D.N.Y. 1952), aff'd, 201 F.2d 889 (2d Cir.), cert. denied, 345 U.S. 995 (1953).

Under the principles enunciated by the foregoing cases, Zartleg's appeal fails for lack of any foundation.

First, no title or property interest ever vested in Zartleg. The Trustee concurs in and adopts the argument presented in Channel's brief demonstrating that all sales in bankruptcy cases are not final until an order confirming the sale is made. As stated in In re Shea, 126 F. 153 (1st Cir. 1903),

> "when a sale is made subject to confirmation, no title vests until it is confirmed. Under such circumstances it is all the more difficult for an appellate tribunal to interfere with the exercise of the discretion of the court of the first instance. If a judicial tribunal authorized to make a judicial sale expressly reserves the right to approve or disapprove, it certainly would require a very extreme case to justify some other tribunal in injecting its own discretion." 126 F. at 106 [emphasis added].

See also, Smith v. Juhan, 311 F.2d 670 (10th Cir. 1962); In re Stanley Engineering Corp., 164 F.2d 316 (3rd Cir. 1947); Reid v. King, 157 F.2d 868 (4th Cir. 1946); In re Berry & Moser Const. Co., supra.

Thus, notwithstanding the contentions urged by Zartleg, the hearing before the Bankruptcy Court was not an absolute auction. The parties understood that an order confirming any sale was necessary to effect the transfer of the property interest. Therefore, inasmuch as no order confirming the sale to Zartleg was made, title never passed to Zartleg and the Bankruptcy Court was entirely justified in exercising

its discretion to reopen the hearing when advised of the substantially higher offer.

Second, as a result of the action of the Bankruptcy Court, the bankrupt estate and its creditors have received the benefit of an additional $227,400, hardly evidence of an abuse of discretion.

Third, there was no prejudice to any of the parties in interest. Title could not pass to Zartleg unless and until an order was made confirming a sale to it; however, this never occurred. Moreover, Zartleg had ample opportunity to outbid Channel at the reopened hearing, but did not. Finally, all the events--the original hearing, the reopened hearing and the issuance of the confirmation order--occured within a period of twenty days, hardly sufficient time for Zartleg to be prejudiced. In truth, any loss it has suffered is only due to its inability to meet the more favorable offers made by Channel.

The facts and applicable law simply do not support or establish any basis upon which the order of the District Court should be set aside and the bankrupt estate and its creditors deprived of the additional $227,400 realized from the sales to Channel. The Bankruptcy Court acted within its sound discretion in reopening the hearing in the face of an offer almost double the amount previously offered by Zartleg, and

its action resulted in a considerable benefit to the estate. The order of the District Court should, therefore, be affirmed.

II

THE APPEAL IS MOOT SINCE ZARTLEG DID NOT OBTAIN A STAY OF THE ORDERS OF THE BANKRUPTCY COURT PENDING APPEAL, AS REQUIRED BY THE RULES OF BANKRUPTCY PROCEDURE

Rule 805* of the Rules of Bankruptcy Procedure, 411 U.S. 1008 (1973), entitled "Stay Pending Appeal," sets forth a clear-cut procedure for obtaining a stay of enforcement of an order and adopts a special incentive for obtaining a stay in cases of appeals from orders confirming sales of property of a bankrupt:

> "A motion for a stay of the judgment or order of a referee, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be made in the first instance to the referee. Notwithstanding Rule 762 but subject to the power of the district court reserved hereinafter, the referee may suspend or order the continuation of proceedings or make any other appropriate order during the pendency of an appeal upon such terms as will protect the rights of all parties in interest. A motion for such relief, or for modification or termination of relief granted by the referee, may be made to the district court, but the motion shall show why the relief, modification, or termination was not obtained from the referee. The district court may condition the relief it grants under this rule upon the filing of a bond or other ap-

* At the time of the entry of the two orders on December 31, 1975, Grant's case was still pending under Chapter XI of the Bankruptcy Act. Bankruptcy Rule 805 is made applicable to Chapter XI cases by Chapter XI Rule 11-62, 415 U.S. 1038 (1974).

> propriate security with the referee. A trustee or receiver may be required to give a supersedeas bond or other appropriate security in order to obtain a stay when taking an appeal. Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal, whether or not the purchase or holder knows of the pendency of the appeal." [Emphasis supplied].

The last sentence of Rule 805 became effective on August 1, 1976, pursuant to an order of the Supreme Court of the United States, dated April 26, 1976, ___ U.S. ___ (1976).* However, as the Advisory Committee's Note to Rule 805 points out, this sentence "is declaratory of existing case law." Thus, even before the adoption of the 1976 Amendments to the Rules of Bankruptcy Procedure, it had been held that unless the party taking an appeal from an order confirming a sale of the property of a bankrupt obtained a stay pending appeal, the stay was moot. The issue was addressed in the following manner by the Fourth Circuit Court of Appeals in In re Abingdon Realty Corp., 530 F.2d 588 (4th Cir. 1976):

> "It is settled law that the filing of a petition to review an order of a bankruptcy judge (formerly a referee in

* Prior to August 1, 1976, this sentence was explicitly read into Rule 805 in the context of a Chapter XI case, pursuant to Chapter XI Rule 11-62. Chapter XI Rule 11-62 became unnecessary upon the adoption of the 1976 amendment to Rule 805 and accordingly was itself deleted in the 1976 Amendments.

bankruptcy), does not stay the effect or operation of the order unless a supersedeas bond is filed or the order itself provides for a stay. Sterling v. Blackwelder, 405 F.2d 884 (4 Cir. 1969); Taylor v. Austrian, 154 F.2d 107 (4 Cir. 1946); In re Spier Aircraft Corp., 137 F.2d 736 (3 Cir. 1943); Quinn v. Gardner, 32 F.2d 772, 773 (8 Cir. 1929); In re Stratford Financial Corp., 264 F. Supp. 917, 918 (S.D.N.Y. 1967); 2A Collier on Bankruptcy 14th ed., 1974, ¶39.26, p. 1526. A proposed amendment to Bankruptcy Rule 805, which has been approved by the Judicial Conference of the United States, would add the following sentence at the end of that rule: 'Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser or holder knows of the pendency of the appeal.' The Advisory Committee's Note states that the sentence proposed to be added is 'declaratory of existing case law'. We agree. Sterling v. Blackwelder, supra; Taylor v. Austrian, supra. See also Fink v. Continental Foundry & Machine Co., 240 F.2d 369 (7 Cir.), cert. den. 354 U.S 938, 77 S.Ct. 1401, 1 L. Ed. 2d 1538 (1957); Sobel v. Whittier Corp., 195 F.2d 361 (6 Cir. 1952); 11 Wright & Miller, Federal Practice and Procedure: Civil § 2904, n.31.

" ....No stay of the effectiveness of the orders of the bankruptcy judge was sought by [the bankrupt], its receiver in bankruptcy or any one else, and the sale had been consumated. The appeal from the orders of the bankruptcy judge had become moot, since under these circumstances the district judge could not properly have ordered that the sale be set aside." 530 F.2d 588, 589-90 (4th Cir. 1976) (emphasis supplied).

The Abingdon Realty principle has recently been reaffirmed by the Seventh Circuit Court of Appeals in Country Fairways, Inc. v. Mottaz, 2 Bankr. L. Rep. ¶66,023 at 75,830 (7th Cir. 1976):

> "It is undisputed that there was a sale of the debor's assets to a good faith purchaser and that this sale was confirmed by the bankruptcy court.... While an appeal was taken from the order confirming the sale, appellant failed to request a stay order or file a supersedeas bond required as a condition for a stay." Id. at 75,832.

Consequently, the Court held that

> "the appeal from the bankruptcy court order became moot in the absence of a stay order or the filing of the required supersedeas bond." Id. at 75,833.

The recent amendment to Bankruptcy Rule 805, then, only makes explicit in the Rule the interpretation the courts have long given it: that unless an order confirming a sale of property of a bankrupt estate has been stayed before consummation, an appeal taken from it is moot.

Turning to the appeal at bar, Zartleg made no application pursuant to Chapter XI Rule 11-62 and/or Bankruptcy Rule 805 for a stay of the December 31, 1975 orders of the Bankruptcy Court, nor did it take any action whatsoever to enjoin the implementation of those orders. As a result, the sale confirmed by the Bankruptcy Court has long since taken place and Channel now owns the leases in question. A fortiori, the holdings of the Abingdon Realty and Country Fairways cases,

as incorporated into Bankruptcy Rule 805 (and, as of December 31, 1975, into Chapter XI Rule 11-62) govern. The appeal of Zartleg is moot.

III

ZARTLEG IS NOT ENTITLED TO RECOVER DAMAGES AS A RESULT OF MISTAKENLY BELIEVING THAT THE SALE WAS FINAL ON DECEMBER 11, 1975

In Point II of its brief, Zartleg argues that it should be entitled to recover expenses allegedly incurred as a result of its belief that the sale was final on December 11, 1975. Nevertheless, neither the Trustee nor Channel can be held accountable for Zartleg's overzealous actions in assuming it had acquired a property interest before the entry of an order confirming the sale. Any expense that Zartleg incurred was at its own risk.

Moreover, the procedure that Zartleg employed to recover its expenses was fatally defective. In its motion for reargument (A157ff), Zartleg, almost as an afterthought, included a list of the expenses incurred after the December 11 hearing. (A171). However, nowhere in its notice of motion for reargument in the Bankruptcy Court or in oral argument itself did Zartleg pray for reimbursement of its reliance expenses. (A157-8; 184-207). It raised the issue of its expenses only as an equitable argument for not reopening bidding.

The first time the idea was ever raised of directly reimbursing Zartleg for its expenses allegedly incurred in reliance upon its mistaken interpretation of the December 11, 1975 hearing was at the argument of the appeals in the District Court. In effect, an appellate court was being asked to grant damages on a claim that was neither pleaded nor tried before the court of original jurisdiction.

Zartleg's argument in Point II of its brief is nothing more than a smokescreen for its failure to apprise itself of, and abide by the elementary steps set forth in the Rules of Bankruptcy Procedure for seeking money damages in proceedings in the bankruptcy court. Bankruptcy Rule 701 requires that an adversary proceeding be commenced to "recover money or property." In turn, the commencement of an adversary proceeding requires the service of a summons, notice of trial and complaint under Bankruptcy Rule 704. Though simple, this procedure is more than a mere formality.

Zartleg is now attempting to recover more than $50,000 in damages. Having neglected to bring its claim in the proper time and manner, it should not be allowed to do so on the terms suggested in its brief. Its reimbursement claim is based on contested factual and legal issues which, as District Judge Wyatt noted, have not yet been presented to a court of competent jurisdiction or power. (A228). Accordingly, a complaint should be served, the Trustee should answer,

the parties must have the opportunity to take discovery, and a trial should be held before the Bankruptcy Court, all as set forth in Part VII of the Rules of Bankruptcy Procedure. Neither this court on appeal, nor the Bankruptcy Judge on the basis of the papers before him, is in a position to rule on the disputed issues first raised in Zartleg's appeal. Accordingly, Zartleg should be directed to prosecute its claim for reimbursement by commencing an adversary proceding in the appropriate manner in the Bankruptcy Court.

CONCLUSION

The order of the District Court should be affirmed in all respects.

Respectfully submitted,

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COWAN, LIEBOWITZ & LATMAN
ATTORNEYS FOR

Before [illegible]
[illegible]
Brief to appellant
for Jack Dashish
Atty for appellant

Jessie Lee Halpin v Barnes
Brief for J Dashish
S Ct Sept 20, 76